

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 10



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Niurka Andino,

Plaintiff,

Decision and Order
Index No. 26798/04

- against -

Ronald Mills and the New York City Transit Authority,

Defendants.
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Plaintiff Niurka Andino alleges that Ronald Mills, a NYC Transit Authority supervisor, while driving his official vehicle, negligently crossed Pelham Parkway and crashed into a police car ("RMP"). Ms. Andino sat in the passenger seat of the RMP in her official capacity as a NYC police officer; her fellow officer drove the RMP against the red light on Boston Road in response to an emergency. At trial, an EMT ambulance driver who witnessed the accident corroborated the testimony of the plaintiff and her fellow officer. The plaintiff sustained a concussion, injured her knee and requires a knee replacement: three surgeries to her right knee were unsuccessful. Her orthopedic surgeon recommends that her knee replacement be delayed notwithstanding severe pain because of her relatively young age. Ms. Andino additionally suffers from severe post-concussion syndrome.

Defendant Mills testified that the officer operating the RMP was liable since he failed to activate the vehicle's flashing lights and police siren. The defendant's vocational rehabilitation witness and a doctor testified that the plaintiff, who was discharged from the police force, is able to work part-time. The jury returned a \$31,000,000.00 verdict in the plaintiff's favor.

As a consequence of her injury in the line-of-duty, Ms. Andino receives an accidental disability allowance ("ADR") and lifetime medical coverage. Following the trial, the defendants requested a collateral source hearing on the ground that the plaintiff's disability pension "replaces the earnings she would have received had she continued working as a police officer and the pension she would have received upon retirement as a police officer." The defendants maintain that the plaintiff's disability pension and health insurance benefits should offset the award Ms. Andino received for loss of earnings, lost pension and future medical expenses.

Admissibility of Collateral Source of Payment

Former CPLR § 4545(c), re-lettered as CPLR § 4545(a), applies to actions commenced prior to 11/11/09. Former CPLR § 4545(c) provides that:

In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental 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 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 such as insurance (except for life insurance), social security (except those benefits provided under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. 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.

CPLR § 4545 thus authorizes the Court in a personal injury action to reduce an award if it finds that any element of the economic loss encompassed in an award will be replaced by a collateral source, in whole or in part, provided that "the collateral source payment represents reimbursement for a particular category of loss that corresponds to a category of loss for which damages were awarded." (*Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995].) Because CPLR § 4545 was enacted in derogation of the common law, the statute, as such, must be strictly construed. (*Oden* at 87 NY2d 86.) In *Oden*, like here, the moving party sought to reduce the plaintiff's award by the entire amount the plaintiff was expected to receive from his disability retirement pension. In rejecting the defendant's argument for an offset, the Court of Appeals determined that the plaintiff's retirement pension benefits did not replace the lost future earnings and health and welfare benefits encompassed by the jury's award:

Rather, those (disability retirement pension) benefits are paid in lieu of ordinary pension benefits and do not necessarily

correspond to any future earning capacity plaintiff might have had. Indeed, it is undisputed that, notwithstanding his retirement as an ironworker, plaintiff would have been free to earn income from his labor in other capacities without loss of his disability retirement pension benefits. Thus, it cannot be said that the disability pension benefits plaintiff expects to receive are duplicative of the award he received for lost future earnings." (*Oden* at 87 NY2d 88.)

Finding that "only those collateral source payments that actually replace a particular category of awarded economic loss may be used to reduce the insured's judgment," the Court of Appeals held that:

A disability annuity received as a result of an accident cannot be said to "replace" an out-of-pocket medical expense that the plaintiff incurred as a result of accident-related injuries. The proposition that a payment from "any" collateral source "replace[s] or indemnifie[s]" "any" accident-related cost or expense thus cannot be sustained. (*Oden* at 87 NY2d 87.)

In support of its argument for an offset, the defendant references *Terranova v NYC Tr. Authority*, 49 AD3d 10 (2nd Dept 2007) which held that the NYC Transit Authority was entitled to an offset based on the firefighter's line-of-duty accident disability retirement pension:

The Transit Authority...established by clear and convincing evidence that the plaintiff has a legal right to receive such payments continuously. According to the testimony at the hearing, the plaintiff may be deprived of his pension payments, in whole or in part, only if the plaintiff were to earn income in excess of a particular earning cap, accept employment with another public entity, or be found able to engage in gainful employment. The plaintiff testified, however, that he had neither scheduled any job interviews nor sought work in any fields and that he was not currently working, except for some Internet work as an affiliate travel agent earning an amount well below the cap. The plaintiff's orthopedic surgeon testified that the plaintiff could not engage in physical labor due to his injury and that he would likely develop future problems requiring additional surgeries. "[T]he mere possibility that a disabled plaintiff's condition may improve...is too speculative to preclude application of the collateral source rule (cites omitted). The Transit Authority thus met its burden of proving that it is highly probable that the plaintiff will continue to be eligible for his disability pension with reasonable certainty...and

established that the plaintiff's disability retirement pension was a collateral source within the meaning of CPLR § 4545(c) that must be set off against the amount of the verdict. (*Terranova* at 19-20).

Applicable Standards

In contrast to the Second Department's holding in *Terranova*, the First Department in *Johnson v NYC Transit Authority* hewed to *Oden*, thus rejecting an earlier First Department ruling in *Iazetti v City of New York* which "purport(ed) to stand for the broad proposition that disability retirement benefits always constitute an offset of a lost earnings award." (*Johnson v NYC Transit Authority*, 88 AD3d 321, 329 [1st Dept 2011]; *Iazetti v City of New York*, 216 AD2d 214 [1st Dept 1995], *appeal after remand* 256 AD2d 140 [1998], *revd on other grounds* 94 NY2d 183 [1999]). While declining to hold that *Oden* sets forth a general rule that disability pensions can never be substituted for lost earnings, the First Department held that *Oden* requires a direct match between the benefit and the loss of earnings award. In *Johnson*, the plaintiff was a 14 year veteran of the NYC Police Department Transit Bureau who was injured in the line-of-duty. After the plaintiff prevailed at trial, the defendant requested a collateral source hearing pursuant to CPLR § 4545 to offset the jury's loss of earnings award by the amount of the plaintiff's disability pension. The evidence established that the plaintiff was granted an accidental disability retirement pension ("ADR") based on her line-of-duty injury two years before she would have been entitled to a regular disability pension. The plaintiff's disability was the equivalent of 75% of her salary, not subject to state or federal taxes and, like the regular service retirement pension, payable for life. In affirming the trial court, the First Department found that the record did not establish that this particular disability pension was meant to replace the plaintiff's lost earnings, noting:

Nor does defendant identify any statute or legislative history to show that the pension received by plaintiff was intended to be a substitute for lost earnings as opposed to an early retirement benefit conferred upon police officers accidentally injured in the line-of-duty. Although certain sections of the Administrative Code of the City of New York relate to disability pensions for New York City police officers, neither the briefs in the trial court nor the briefs submitted to this Court identify these statutes as governing plaintiff's disability pension. We cannot assume that these provisions are applicable, and in the absence of any citation to them by defendant, we decline to speculate. (*Johnson* at 328.)

At the collateral hearing in issue, Nicole Giambarrese, Acting General Counsel for the NYC Police Pension Fund, testified that accidental disability retirement pensions ("ADR") are awarded to uniformed members of the police force who are found to be disabled and unable to perform mentally or physically their police duties as a result of a

line-of-duty injury. Ms. Giambarrese informed the Court that the NYPD offers four different pensions: a vested benefit for members with less than 20 years of service; a service pension for members with 20 or more years of service; an ordinary disability pension; and an accident disability pension.

Ms. Giambarrese testified that plaintiff Andino's ADR is triple tax-free; her mandatory retirement age is 63. The plaintiff qualified for an ADR based on 75% of her last year's average salary, the same ADR available had she worked but one day on the job because the plaintiff was injured in the line-of-duty.

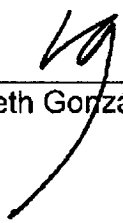
Ms. Giambarrese acknowledged that the plaintiff is free to earn income from labor in other capacities so long as the combined amounts of her pension benefits and outside income do not exceed the top salary of an NYPD lieutenant, an amount in this instance roughly equal to the pension benefit itself. This limitation would remain in effect only until the 20th anniversary of Ms. Andino's appointment to the police force, at which time she would be free to earn any amount in the private sector without reducing her ADR benefits. The parties stipulated that the plaintiff served on the force for 13 years. Plaintiff Andino testified that she has neither been offered a job nor looked for employment since her disability commenced in August 2009; her doctors testified at trial that she is permanently unable to work in any capacity. To the extent that the plaintiff's ADR benefits are guaranteed for life, and not a lost earnings dollar match that ends on her mandatory retirement date at age 63, the Court finds that there is no direct match between the plaintiff's ADR and the jury's award for lost earnings. In keeping with *Oden* and *Johnson*, this Court finds that the plaintiff's ADR pension is a benefit made available to a public servant who was injured in the line-of-duty, not a substitute for lost earnings. The Court accordingly determines that the plaintiff's ADR pension cannot be offset from the jury's award for lost earnings and lost pension.

The defendant also seeks to offset the HMO medical coverage afforded to the plaintiff. Testimony at trial established that although she could previously treat with doctors of her choosing under the health care coverage provided prior to retirement, Ms. Andino is unable to treat with her orthopedic surgeon since he is now out-of-network; the Court notes that the plaintiff's surgeon performed her three previous knee surgeries and testified that his patient requires at least two further surgeries including a total knee replacement. The plaintiff cannot treat with her rehabilitation specialist, who is also out-of-network. The plaintiff's HMO benefits have changed several times and her co-payments have increased substantially since her retirement. The defendant argues that there is no requirement that Ms. Andino's insurance policy authorize visits to the same doctors whom she visited before. This Court determines that the plaintiff's health benefits cannot be offset from the jury's award for future medical expenses since there is no direct match with her current health care benefits.

The defendant has failed to establish with reasonable certainty that the plaintiff's lost earnings, lost pension and future medical expenses were or will, with reasonable certainty, be replaced or indemnified from any collateral source. Neither the plaintiff's ADR benefits

nor her lifetime medical coverage duplicate the award that she will receive. The defendant's application for an offset is accordingly denied.

Dated: March 19, 2014
Bronx, New York



Hon. Lizbeth Gorzález