

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

MICHELE DOMINIQUE PAIR,

Plaintiff,

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CIVIL ACTION FILE

v.

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)

17 EV 003285

WILLIAM HOWLND TOWNSEND,

Defendant,

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ORDER

The above styled action came regularly before the Court on James River Insurance Company's *Motion for Partial Summary Judgment*. All parties were represented by counsel. After oral argument and consideration of the entire record, the Court issues the following Order:

In this action for personal injuries, uninsured motorist carrier James River Insurance Company moves for partial summary judgment on Plaintiff's claim for lost earnings.<sup>1</sup> This action arises from a collision occurring on August 11, 2017. Defendant Townsend was allegedly operating his car under the influence of drugs and alcohol and was fleeing a previous collision when he struck the car in which Plaintiff was an Uber passenger. As a result of injuries suffered, Plaintiff claims that she incurred lost earnings in the amount she would have otherwise earned in commissions on the sale of a 16 single family homes.

At the time of the accident, Plaintiff contends that she had been a licensed real estate agent for 20 years. She was also a 25% partner in Norris Development Group, LLC, an entity formed to develop 16 single family residences in East Atlanta.

<sup>1</sup> James River also moved for summary judgment as to punitive damages, but that claim has been withdrawn.

According to the testimony of Chief Executive Manager Jack T. Hamilton, Plaintiff was to help the sale of the properties as the listing agent. (Hamilton at 45) She was to earn 3% commission on the sale of each house sold or 6% if there was no buyer's agent. Mr. Hamilton estimated that Plaintiff would have earned a minimum of \$244,000 and likely in excess of \$300,000. This commission structure was agreed to when Plaintiff's role as licensing agent was agreed to and commissions to her would have been paid before distributions to the other partners. (Hamilton at 46). For two years Plaintiff worked on the project but earned no salary. Her compensation was to be paid in commissions when the properties were sold.<sup>2</sup> As a result of the collision, Plaintiff contends that she suffered a traumatic brain injury and began experiencing debilitating neck and back pain that impacted her ability to work. After her partners came to the conclusion that she was unable to do her job, a third-party agency was brought in to market the properties.

James River Insurance contends that Plaintiff has an insufficient track record as a real estate agent to support the recovery of lost earnings. As succinctly stated in its reply brief, "the evidence in this case would require a jury to speculate wildly that Ms. Pair was appropriately skilled to market and sell for this type of property, and such speculation is not allowed under Georgia law." While the new agency brought in to replace Plaintiff is argued by James River to be well established with the capability to broadly market the homes, many of the homes remain unsold. As of the date of Plaintiff's brief, it is contended that eight have been sold.

In the five years preceding the incident, Plaintiff had worked in the information technology field. While she had been a licensed real estate agent for

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<sup>2</sup> Because her license was held by an independent brokerage, Plaintiff was an independent contractor for purposes of marketing the properties.

many years, her experience was in selling large tracts of land rather than single family residences. It is therefore contended that the jury would be required to speculate in awarding award lost wages where Plaintiff has an insufficient history of earning commissions on residential real estate.

What is not speculative is the commission to be earned on the sale of the properties, the number of properties subject to the agreement, and Plaintiff's entitlement to commission as the listing agent. Loss of earnings must be proven with "reasonable certainty" to permit computation by the jury. However, "the rule against the recovery of vague, speculative, or uncertain damages related more especially to the uncertainty as to the cause, rather than uncertainty as to the measure or extent of the damages. Mere difficulty in fixing their exact amount, where proximately flowing from the alleged injury, does not constitute a legal obstacle in the way of their allowance, when the amount of the recovery comes within that authorized with reasonable certainty by the legal evidence submitted" Dossie v. Sherwood, 308 G. App. 185 (2011). In *Dossie*, the Plaintiff had just started an independent delivery service when he was involved in a traffic collision. During the six months of his recovery, he lost his delivery contract and was forced to return to his former employment. On appeal, the Court affirmed the denial of a directed verdict motion on the issue of lost earnings- finding that evidence of a delivery contract coupled with causation of his inability to work were sufficient to reach the jury. In a footnote, the Court further explained that lost earnings suffered by an independent contractor are different from lost profits or lost wages:

“[t]he very difficulty which confronts a plaintiff seeking to recover such probable earnings on account of time lost through the tortious act of another is responsible for *the more liberal rule generally adopted and the greater latitude allowed by the courts in the matter of such proof, since every right*

*must have its remedy, and strict requirement along this line might deny a sufficient remedy to one who happened to be laboring not for a fixed and definite salary, but for fees or commissions," and that "[w]here by the very nature of things no better evidence is available or possible of production, the law perforce contents itself with proof of past average earnings, not always perhaps as proof of actual lost profits, but as illustrating the earning capacity of the plaintiff, and hence the value of his lost time" (emphasis supplied)). In any event, Sherwood's lost earnings are recoverable from the time of his personal injury until the date of trial, so long as causation is established and the amount sought is sufficiently proven"*

The Court finds that Defendant's arguments are better addressed to the trier of fact. While it may be a legitimate question whether Plaintiff's experience of selling large tracts of land provides an adequate forecast of success as a listing agent for residential property, it is not an experience that the Court may disregard as a matter of law. Further, it may be that Plaintiff would have had greater difficulty in marketing the properties than the agency subsequently brought in to replace her. However, these are matters for the jury to determine after hearing all relevant evidence. The motion of James River Insurance is therefore DENIED.

IT IS SO ORDERED THIS THE 17<sup>th</sup> DAY OF JULY 2019

\_\_\_\_s/John Mather\_\_\_\_\_  
John R. Mather  
Judge, State Court Fulton County