

Rochdale Ins. Co. v Mullaney & Gjelaj, PLLC

2016 NY Slip Op 30914(U)

May 17, 2016

Supreme Court, New York County

Docket Number: 160452/2015

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X

ROCHDALE INSURANCE COMPANY,

Plaintiff,

Index No. 160452/2015

-against-

DECISION/ORDER

MULLANEY & GJELAJ, PLLC, NICK GJELAJ, ESQ.,
and PATRICK J. MULLANEY, ESQ.,

Defendants.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff commenced the instant action to recover a lien created pursuant to Workers' Compensation Law § 29 when the injured worker settled his third-party claim and now moves for an Order granting it partial summary judgment against defendants as to liability. Defendants cross-move for an Order pursuant to Workers' Compensation Law § 29 extinguishing plaintiff's workers' compensation lien or, in the alternative, preserving certain rights of the injured worker. Plaintiff's motion and defendants' cross-motion are resolved as set forth below.

The relevant facts are as follows. On or about November 9, 2011, non-party Gyula Nacsa ("Nacsa") was injured when the platform on which he was performing construction work collapsed, causing him to fall. He filed for workers' compensation benefits from N&M Stucco, his employer. Plaintiff Rochdale Insurance Company is N&M Stucco's workers' compensation carrier. AmTrust North America ("AmTrust") is the parent company of plaintiff. In or around

April 2015, petitioner settled his third-party action against the owner and general contractor for the construction project for \$975,000.00. On or about April 14, 2015, after defendants, Nacsa's counsel, sent a letter to AmTrust requesting plaintiff's consent to the pending settlement, AmTrust, on behalf of plaintiff, sent defendants a letter consenting to the amount of the settlement. The letter stated that plaintiff was entitled to a lien of \$53,321.51, and that the "release of funds to Gyula Nacsa will constitute acceptance of the terms of this consent letter." In addition, the letter reserved plaintiff's "right to claim a credit and offset for the net amount of the settlement payable to the Plaintiff against any prior, subsequent or future claim for Workers' Compensation, indemnity and/or medical benefits arising out of this occurrence."

The letter also stated that,

No claim now or in the future by the injured worker shall be made against Rochdale Insurance Company, for expenses of recovery as in the matter of Kelly vs. SIF or Burns v. Varriale, or Stenson vs. NYS Dept. of Transportation and Bissell vs. Town of Amherst. Please also be aware that per Williams v. Lloyd Dunterh Elevator Services, Inc. et. al. [sic] 104 A.D.3d 2013, all benefits to Gyula Nacsa are suspended as of 04/13/2015.

On or about August 17, 2015, after plaintiff inquired about the status of its lien, defendants sent a letter to plaintiff stating that they had not yet distributed all the settlement proceeds and requesting a 30-day extension to "resolve" the lien issue, without offering any explanation for the 30-day delay. Defendants later requested that plaintiff amend its consent letter to state that Nacsa "preserves his rights to under Burns v. Varriale [sic], to petition the Workers' Compensation Board to require the carrier to periodically pay its equitable share of attorney's fees and costs incurred by the claimant in securing any continuous compensation benefits" and to "continue the benefits previously extended." Thereafter, plaintiff commenced the instant action.

The court first considers plaintiff's motion for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Pursuant to Workers' Compensation Law § 29(1), an employee may bring an action against a third party while receiving workers' compensation benefits. If the employee recovers in or settles the third-party action, "the compensation carrier is granted a lien on the amount of the recovery proceeds equal to the amount of past compensation it has paid, with interest," subject to a deduction for attorney's fees and costs. *Kelly v. State Ins. Fund*, 60 N.Y.2d 131, 136 (1983). The carrier is also granted a "credit for any future benefits owed the claimant until the proceeds of the recovery are exhausted." *Williams v. Lloyd Gunther Elevator Service, Inc.*, 104 A.D.3d 1013, 1014 (3rd Dept 2013). "The legal enforceability of the lien does not depend upon the identity of the party having possession, custody and/or control of the proceeds of the settlement." *Commissioners of State Ins. Fund v. Gyeltzen*, 2015 N.Y. Slip Op. 30164(U) (Sup Ct, NY County 2015), *citing Commissioners of State Ins. Fund v. Schell*, 23 A.D.2d 556 (1st Dept 1965) (holding that plaintiff's counsel may be held liable where it held the settlement funds).

A claimant who settles a third-party action for less than the compensation benefits paid or payable under the Workers' Compensation Law must obtain the written consent of the workers'

compensation carrier or obtain an order from the court approving the settlement. Workers' Compensation Law § 29(5). "To induce settlement, a carrier may waive its lien for less than the amount to which it is entitled, but if it also wishes to retain its right to future offsets it must do so explicitly." *Miller v. Arrow Carriers Corp.*, 130 A.D.2d 279, 281 (3rd Dept 1987).

In the present case, plaintiff has made a *prima facie* showing of its entitlement to summary judgment for a lien against the settlement proceeds. Plaintiff has established through the affidavit testimony of Trish Meacham ("Meacham"), a Senior Subrogation Supervisor for AmTrust North America, and the correspondence between the parties that it paid workers' compensation benefits to Nacsa. Further, plaintiff has established through the affidavit testimony of Meacham and the letter from defendants' office to plaintiff dated August 17, 2015 that Nacsa settled his third-party action and at least some of the proceeds were disbursed. Plaintiff has also submitted its letter dated April 14, 2015 consenting to the settlement and settling its workers' compensation lien for \$53,321.51.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' argument that the consent letter is void as contrary to law and public policy because plaintiff waived its obligation to periodically pay its equitable share of attorney's fees and costs in the consent letter is without merit. Plaintiff is permitted to waive its obligation to periodically pay its equitable share of attorney's fees and costs in its consent letter. Generally, a carrier is required to pay "its equitable share of attorney's fees and costs incurred by claimant in securing any continuous compensation benefits." *Burns v. Varriale*, 9 N.Y.3d 207, 217 (2007). Because "the carrier's future benefit [of an offset] must be taken into account" in determining a carrier's equitable share of the litigation costs, even when the future benefits to which a claimant is entitled are speculative as where a claimant has a permanent partial disability, the carrier is

required to “periodically pay its equitable share of attorney’s fees and costs.” *Stenson v. New York State Dept. of Transp.*, 96 A.D.3d 1125, 1126 (3rd Dept 2012). However, a carrier’s consent to a settlement agreement may “expressly release the carrier from its affirmative obligation to pay its share of the litigation costs as the offset – a benefit to the carrier in addition to the satisfaction of its lien” – accrues. *Id.* at 1126.

In the present case, plaintiff’s consent letter expressly releases plaintiff from its affirmative obligation to periodically pay its share of litigation costs as is generally required under *Burns*. Defendants accepted the terms of plaintiff’s consent letter by disbursing some of the settlement proceeds. If defendants intended to preserve Nacsa’s *Burns* rights, defendants or Nacsa should have objected to and renegotiated plaintiff’s consent letter or sought a court order before settling the action and disbursing some of the settlement proceeds.

Further, defendants’ argument that the consent letter is void because plaintiff waived its obligation to pay future workers’ compensation benefits is without merit. It is clear from the face of the consent letter that plaintiff did not waive any obligation to pay future workers’ compensation benefits to Nacsa after any offset is exhausted. Contrary to defendants’ contention, the statement in the consent letter that “per *Williams v. Lloyd Dunterh Elevator Services, Inc.*...all benefits to Gyula Nacsa are suspended as of 4/13/2015” merely expresses plaintiff’s intention to claim its offset as of the date of its consent, not plaintiff’s intention to waive any obligation to pay future workers’ compensation benefits. *See Matter of Williams v. Lloyd Gunther El. Serv., Inc.*, 104 A.D.3d 1013, 1015 (3rd Dept 2013) (holding that an insurance carrier is permitted to claim its offset as of the date of consent rather than the date of the settlement).

For the foregoing reasons, defendants’ cross-motion to extinguish plaintiff’s workers’

