

**Farm Family Cas. Ins. Co. v Kieper**

2008 NY Slip Op 31835(U)

June 30, 2008

Supreme Court, Wayne County

Docket Number: 0062980/2008

Judge: Dennis M. Kehoe

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF WAYNE

---

FARM FAMILY CASUALTY INSURANCE COMPANY  
a/s/o RAYMON MORGAN

Plaintiff,

DECISION  
AND  
ORDER

-vs-

RACHEL KIEPER AS EXECUTRIX OF THE  
ESTATE OF DAVID W. KIEPER,

Index No. 62980

2008

Defendant.

---

Allen D. Werte, PLLC  
Gwenn E. Haesler, Esq., of Counsel  
Attorneys for Plaintiff

Egger & Leegant  
Jan P. Egger, Esq., of Counsel  
Attorneys for Defendant

---

The Defendant ("Kieper") has moved for an Order dismissing the Plaintiff's Complaint in its entirety, based on res judicata and other defenses. The Plaintiff ("Farm Family") has opposed the motion.

(The Court here notes that one of the grounds relied on by the Defendant as a basis for dismissal was Plaintiff's failure to respond to its demands for discovery. As of the return date of this motion, the Plaintiff

had complied with those demands, albeit belatedly, and the Court need not address that argument.)

The instant action is brought by Farm Family as subrogee of Raymon Morgan, who was involved in a motor vehicle accident which occurred on September 23, 2004. Morgan commenced an action against Rachel Kieper as Executrix of her son David Kieper, who was the driver of the motor vehicle and who died in the accident. The action was subsequently settled; Morgan executed a general release, and a Stipulation of Discontinuance was filed. While that action was still pending, however, Farm Family commenced the instant action as Morgan's subrogor, on September 6, 2007, seeking reimbursement from Kieper for Morgan's medical expenses, which were paid by Farm Family, in the amount of \$22, 170.62.

The Defendant relies on the doctrines of res judicata and/or collateral estoppel in support of its motion to dismiss. The Defendant also relies on the release executed by Morgan, as well as the Stipulation of Discontinuance, which ultimately concluded the action, as constituting a bar to any further action arising from the same incident.

It is axiomatic that a subrogee "stands in the shoes" of the subrogor,

possessing only those rights possessed by the subrogor. It is also well-settled that, as a general rule, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” (See Zayat v Collins, 48 AD3d 1287 (4<sup>th</sup> Dept, 2008), quoting O’Brien v City of Syracuse, 54 NY2d 353 (1981)).

The facts relied on by Farm Family are these : that Morgan included in his request for relief a claim for medical expenses, as set forth in his Supplemental Bill of Particulars, and that he subsequently executed an allegedly unconditional Release and Stipulation of Discontinuance. These allegations, taken together, arguably preclude Farm Family from seeking reimbursement.

However, a closer inspection of these documents reveals certain weakness in the Defendant’s contentions. First of all, while Morgan does set forth a claim for medical expenses in the approximate amount of \$25,000.00, he makes it clear in his Supplemental Bill that such expenses were paid by Farm Family, and that Morgan himself makes no claim for such expenses in his own right, as they were paid under the no-fault coverage, provided by Farm Family.

Further, while the Release and Stipulation of Discontinuance executed by Morgan appear to be general in nature, at the bottom of the Release, Morgan clearly states that the total settlement amount is allocated to pain and suffering, and that “(n)o portion of the settlement amount is for medical expenses, all of which were paid for by no-fault insurance.”

In Progressive Insurance Company v. Sheri Torah, Inc., 44 AD3d 837 (2007), the Fourth Department held that “(w)hen an insured executes a general release in favor of a tortfeasor without reserving the rights of his or her insurer (emphasis added), the insured impairs the rights of his insurer.”

However, in the instant matter this Court finds that the language at the foot of Morgan’s release, while not couched in express terms of a reservation of rights, is sufficient to preserve Farm Family’s rights of subrogation.

Further, this Court finds that the doctrines of res judicata/collateral estoppel do not constitute a bar to the instant action. In Ocean Accident & Guarantee Corp v. Hooker Electrochemical Co., 240 NY 37(1925 ), the Court of Appeals held that “an insured cannot extinguish the subrogation rights of its carrier when the defendants are on notice of the carrier’s

claims prior to the settlement.” In this instance, Farm Family instituted the instant action, albeit at the eleventh hour, against Kieper, thus substantiating its claim that the Defendant was on notice of the carrier’s claim, prior to the execution of the release and stipulation of discontinuance.

Therefore, the Defendant’s motion to dismiss the Plaintiff’s Complaint is denied in its entirety.

This Decision constitutes the Order of the Court.

Dated: June 30, 2008  
Lyons, New York

  
\_\_\_\_\_  
Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

MAJESTIC  
SUPREME AND APPELLATE COURT  
'08 JUL -1 P 3:14