

McComber v Lehrer McGovern Bovis, Inc.

2004 NY Slip Op 30137(U)

December 21, 2004

Supreme Court, New York County

Docket Number:

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 46

Benjamin M. Conder

INDEX NO.

113548/00

MOTION DATE

2/3/04

MOTION SEQ. NO.

006

MOTION CAL. NO.

- v -
Leher McGinness Davis
Jue

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 3	
4, 5, 6	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*See accompanying decision
and orders*

FILED
DEC 27 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/20/04
~~12/27/04~~

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

BENJAMIN McCOMBER,

Plaintiff,

Index No. 113548/00

- against -

LEHRER McGOVERN BOVIS, INC. and
INTERSTATE INDUSTRIES,

Defendants.

FILED DECISION
AND ORDER
DEC 27 2004
NEW YORK
COUNTY CLERK'S OFFICE

Nicholas Figueroa, Justice:

Non-party Liberty Mutual Group (Liberty), plaintiff's former Workers' Compensation insurance carrier, seeks an order compelling plaintiff's attorneys, Sacks & Sacks, Esqs. (Sacks), to pay it \$152,403.25, plus interest, the amount it claims as its lien based on plaintiff's recovery in his personal injury action against defendants.

Liberty alleges that it is entitled to recover this sum based on its \$228,605.18 compensation payments to plaintiff, which after a statutory one-third reduction pursuant to Workers' Compensation Law §29(1), results in a \$152,403.15 lien, which Liberty argues should be paid in full without the further reduction that would otherwise be mandated under *Kelly v. State Insurance Fund*, 60 N.Y.2d 131, which provides for a reduction of a lien amount by the value of future benefits that do not have to be paid because of a plaintiff's recovery in a third-party action. Liberty argues the Workers' Compensation Board suspended plaintiff's benefits on July 14, 2003, after the plaintiff settled his action without either Liberty's consent, or leave of court within three months of the alleged settlement. Liberty argues that because of the benefit's suspension, there can be no computation, with reasonable certainty, of the amount of future benefits that plaintiff

would have been entitled to.

Sacks cross moves to extinguish the lien, arguing that the \$400 weekly compensation benefits plaintiff had been receiving establishes a definite basis for the future benefits he would have received (see Workers' Compensation Law §29, *Kelly v. State Insurance Fund, id.*). Sacks argues that the case proceeded to trial and a jury verdict of \$23,516,827.00, albeit one reduced by a "high-low" agreement, to approximately \$14,000,000. It argues that the \$400 weekly sum plaintiff had been receiving could be calculated to determine the amount of compensation payments that were eliminated by the recovery after trial. Sacks argues that plaintiff's prior compensation benefits had been \$400 a week, and that but for the litigation and recovery, which Sacks itself characterizes as a settlement (see Affirmation in Opposition and in Support of Cross Motion, paragraph 7), Liberty would have been obligated to pay that amount for the rest of plaintiff's life. Sacks notes that the jury found that plaintiff's work life was twenty-seven years from the date of verdict, and his life expectancy 41.5 years.

Sacks calculates that, using the *Kelly* formula, the amount of future \$400 weekly compensation payments, over a 41.5 year period, reduced to present value, and applying a discount rate of 4.64 percent, divided by one third, reduces Liberty's claimed lien of \$152,403.45 by \$129,047.77.

Sacks further asserts that because the jury awarded \$6,750,000 in medical expenses, also over a 41.5 year period, the lien, applying the *Kelly* reduction, is entirely extinguished. However, at oral argument, Sacks agreed that future medical expense payments under Workers' Compensation were uncertain.

As Liberty does not challenge either the discount rate or method of calculation Sacks used, the court will only determine whether Liberty's \$152,403.25 asserted lien may be reduced by

\$129,047.77, based on the compensation payments plaintiff had been receiving.

In determining that a claimant is entitled to deduct the value of future compensation payments from the compensation carrier's lien, the Court of Appeals found that the future value of these benefits is not so speculative that it would be improper to calculate their value and use it as an offset (*Matter of Kelly v. State Insurance Fund*, *id.* at 135).

Liberty relies on a Fourth Department case, *McGhee v. Sithe Independence Partners [Liberty Mutual Insurance Company]*, 281 AD2d 891, in support of its argument that a plaintiff who is not receiving compensation benefits is not entitled to a *Kelly* lien reduction. Because the plaintiff was not receiving "ongoing compensation for a total disability", the amount of future payments the carrier would have had to make was speculative. Although not stated in the Appellate Division decision, the record on appeal in *McGhee* reveals that compensation payments had been terminated prior to trial, for reasons unrelated to the negligence action.

The *McGhee* court relied on *Matter of Briggs v. Kansas City Fire & Marine Insurance Company*, 121 AD2d 810. In that case, the compensation beneficiary settled his negligence action, with the trial court's approval. Nevertheless, the Third Department found that future benefits could not be definitely ascertained. Although the plaintiff had been injured, he had substantially recovered by the time of settlement. The only hint of future disability was the plaintiff's self-assessment and a physician's report submitted on the motion to approve the settlement. However, the Workers' Compensation Board, at a hearing subsequent to the settlement, found that the plaintiff was not disabled.

In the instant case, plaintiff was receiving his \$400 weekly compensation benefits both at the time of the high-low agreement and at the time of the jury verdict. The Workers' Compensation Board did not suspend these payments until two months after the jury verdict.

Moreover, the jury found that plaintiff was permanently disabled. The jury awarded plaintiff future pain and suffering damages of \$6,500,000 for the 41.5 years of his remaining life and \$10,266,827 for his 21.5 year work life expectancy. The verdict, following an eight day trial, was based on competent medical testimony.

Had plaintiff's recovery been based on the verdict alone, without the high-low agreement, there could be no dispute that the workers' compensation lien would be reduced by the verdict, as plaintiff was receiving ascertainable benefits and was unquestionably permanently disabled, as demonstrated by the jury verdict. However, the high-low agreement makes a further analysis necessary.

Liberty correctly argues that unless a claimant obtains the compensation carriers' on the court's approval of a settlement within three months of the settlement, the claimant is barred from receiving future compensation benefits (Workers' Compensation Law §29(5), *supra*; *Matter of Stiffen v. CNA Insurance Companies*, 282 AD2d 991). However, a court may approve a settlement *nunc pro tunc*, even after the three month period, if it finds the amount of the settlement is reasonable, and that the delay in seeking approval was not caused by neglect, and the carrier is not prejudiced by the delay (*id.* at 992).

However, before the court addresses the question of whether the settlement was proper, the court must first determine whether the high-low agreement was a settlement.

The Court of Appeals, in another context, deemed a high-low agreement the equivalent of a settlement (see *Gonzales v. Armac Industries*, 81 NY2d 1). In that case, the court held that the high-low agreement was a pre-trial settlement agreement as it ended the dispute between the parties, notwithstanding that the agreement's effect, was postponed until judgment was entered (*id.* at 6, 7). Moreover, the court noted that to treat the agreement as anything other than a

pre-trial settlement would permit the plaintiff to violate General Obligations Law §15-108 and would “do substantial violence to the state’s system of workers’ compensation by thwarting the exclusivity remedy of an employee against his employer...” (*id.* at 8).

The high-low agreement in the instant case does not thwart any statutory provisions. Rather, the agreement worked to the benefit of the compensation carrier by providing for an award that permanently relieves it of the obligation to provide compensation payments to plaintiff. The statutory purpose of Workers’ Compensation Law 29(5) is to protect “carriers from their claimants imprudent settlements...” (*Matter of Daly v. Daly Construction Corporation*, 136 AD2d 798). Therefore, the court, in the context of this proceeding, does not find the high-low agreement to be a settlement.

Even if the court were to view the high-low agreement a settlement for Workers’ Compensation Law §29(5) purposes, the court cannot deem the settlement, one in excess of fourteen million dollars, as entitling Liberty to the full amount of the lien it asserts. In reaching this conclusion, the court is cognizant of the fact that the settlement is large, or even if it is for the maximum of a defendant’s insurance policy, does not eliminate the requirement of a compensation carriers’ consent to, or the court’s approval of a settlement (*see Matter of Johnson v. Buffalo & Erie County Private Industry Council [Workers’ Compensation Board]*, 84 NY2d 1, 20). Liberty does not contend that plaintiff will ever be eligible to receive compensation payments after having received the jury award, as modified by the agreement; therefore, it cannot assert its lien. To find otherwise, the court would unjustly reward Liberty for Sacks’s success at trial.

In any event, even if judicial approval were required, the court must grant that approval *nunc pro tunc*. Although Sacks’s cross motion did not specifically ask for such relief, its

ad damnum clause asks for “such other and further relief as the court may deem just and proper.” There is no question that the verdict, as reduced by the high-low agreement is an adequate amount of money; indeed, it will sustain plaintiff for the remainder of his life. Nor is there any question that Liberty is not harmed by the agreement; rather, as the court noted, it benefits by the agreement. These two factors outweigh Sacks’s failure to promptly seek judicial approval.

Because Sacks agreed that the amount of future medical expenses is uncertain, the court will not grant its request to vacate the lien in its entirety. Rather, the court vacates the lien only to the extent of \$129,047.77, leaving a balance of \$23,355.68 from the \$152,403.45 that Liberty asserts as its lien.


Accordingly, it is

ORDERED that the motion and cross motion are both granted to the extent that Liberty Mutual’s lien is fixed in the sum of \$23,355.68 and otherwise denied.

This constitutes the decision and order of the court.

Dated: December 21, 2004

ENTER



J.S.C.

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