

<b>Vytra Health Plans v Colossal Carting Corp.</b>
2007 NY Slip Op 31030(U)
April 25, 2007
Supreme Court, Suffolk County
Docket Number: 0033695/2006
Judge: Emily Pines
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Supreme Court - State of New York  
I.A.S. Term, Part 23, Suffolk County

Present:

**Hon. Emily Pines**  
Justice Supreme Court

Original Motion Date: 02-22-2007  
Motion Submit Date: 03-01-2007  
Motion Sequence No.: 001 MD

\_\_\_\_\_  
VYTRA HEALTH PLANS, Individually  
and a/s/o DENNIS BURKE, JR.,

Attorney for Plaintiff  
Korybski & Levinson, LLP  
150 Broadway, Suite 1307  
New York, New York 10038

Plaintiffs,

Attorney for Plaintiff/Subrogor Burke, Jr. and Defendants  
Kujawski & Dellicapri  
1637 Deer Park Avenue  
PO Box 661  
Deer Park, New York 11729-0661

-against-

COLOSSAL CARTING CORP. and , TONEY  
P. ABBEY,

Attorney for Defendant  
McMahon, Martine & Gallagher  
90 Broad Street  
New York, New York 10004

Defendants.  
\_\_\_\_\_X

**ORDERED**, that this motion by Defendants pursuant to **CPLR §3212** dismissing the complaint and for sanctions is denied; and it is further

**ORDERED**, that this matter is set down for a hearing on June 18, 2007 at 10:00 a.m. to determine whether the settlement between Plaintiff's insured and Defendants included payments for medical expenses.

This is a subrogation action brought by Plaintiff VYTRA HEALTH PLANS ("VYTRA"), individually and as subrogee, to recover against the Defendants, COLOSSAL CARTING CORP., and TONEY P. ABBEY, for medical expenses incurred on behalf of subrogor DENNIS BURKE, JR. ("BURKE"), for treatment of injuries he suffered in a motor vehicle accident. The submissions reflect that Burke was injured in an automobile accident on February 3, 2004 and thereafter commenced an action against Defendants to recover for the personal injuries he sustained in the accident. That action was settled for \$800,000 and BURKE executed a General Release (the "Release") on or about October 13, 2006. The Release stated that BURKE released and discharged:

the RELEASEE<sup>1</sup>, RELEASEE'S heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR'S heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE. This release is hereby intended to cover the causes of action included in the action below.

On November 27, 2006, BURKE's counsel and Defendant's counsel executed a letter agreement which stated that Plaintiff agreed to "indemnify and hold harmless the Defendants from any liens arising from this case except for the No-Fault subrogation issues discussed in the release. This is to further confirm that the settlement included payment by the Defendant's insurers for the no-fault lien and *it was understood that no portion of Vytra's claim was considered as recoverable if the case went to trial. Thus the Vytra claim was not considered as part of the settlement in the release*" (emphasis added).

The submissions reflect that, as early as December of 2004, Vytra notified BURKE's counsel<sup>2</sup>, advised of its recovery interest in the personal injury claim and requested to be apprised of the status of the case, including dates of hearing, mediation, settlement conferences and/or trials. The record further reflects that VYTRA was seeking to recover \$64,789.21 in medical and hospital services rendered to Burke as a result of the accident. The agreement between VYTRA and BURKE contained the following provision at Section 1.4:

**Service Covered by Another Payment Source**

Choice Care Services received by a Member may also be services for which the Member is entitled to coverage or payment from or by another source. The Member shall pay to Choice Care (or at Choice Care's direction, pay to a physician, Hospital or other provider) the charges for such services, unless the Member fully cooperates and takes all needed actions for Choice Care to receive payment from the other source.

Defendants now move for summary judgment on the ground that VYTRA, as the health care

---

<sup>1</sup> Defendants COLOSSAL and ABBEY were designated as the "Releasees".

<sup>2</sup> The Court notes that BURKE's counsel in the personal injury action is representing Defendants on the within motion.

provider, does not have a statutory right of recovery and that its subrogation claim is barred by **CPLR §4545(c)**, the “collateral source rule”. That section provides that in an action to recover damages for personal injuries, any sum awarded to Plaintiff must be reduced by the amount, if any, representing Plaintiff’s recovery of medical expenses that have been paid from a collateral source, such as health insurance. Thus, Defendants argue that upon BURKE’s settlement with them, VYTRA, as his subrogee, has no further claims. In further support, Defendants annex an affirmation by Defendants’ counsel in the personal injury action, Anthony D. Martine. Mr. Martine states that it was Defendants’ position that “any monies that VYTRA paid in connection with the medical care to MR. BURKE would be non-recoverable in his action. This is based upon **CPLR §4545** and the accompanying statutes embodying the collateral source rule in New York.”

In opposition to the motion, Defendants argue that **CPLR §4545** does not preclude an independent subrogation action by an insurer against an alleged tortfeasor. Specifically, Defendants argue that under the Court of Appeals decision in *Teichman v. Community Hospital of Western Suffolk*, 87 N.Y.2d 514, 640 N.Y.S.2d 472, 663 N.E.2d 628 (1996), **CPLR §4545** is inapplicable to pretrial settlements. Thus, they claim that VYTRA has the right to pursue recovery of its medical expenses in a direct action against a tortfeasor and the motion to dismiss should be denied.

The Court agrees with VYTRA, that **CPLR §4545** does not bar its recovery in the first instance. In *Teichman, supra*, the Court of Appeals found that by its very terms, “**CPLR §4545** applies to admissibility of evidence at trial and to judgments. The statute is silent as to pretrial settlements.... . **CPLR 4545** does not compel the conclusion that medical expenses were necessarily excluded from the settlement.” Moreover, Defendant’s reliance on the November 26, 2006 letter agreement between counsel is misplaced because it specifically acknowledged that the VYTRA claim was not recoverable “if the case went to trial,” and that the VYTRA claim was not considered part of the settlement in the release. However, BURKE’s complaint and the verified bill of particulars in the underlying personal injury action both sought recovery for medical expenses as an element of damages. Specifically, BURKE’s bill of particulars claimed special damages for medical, surgical and hospital services that appear to be contained within the Consolidated Statement of Benefits (of VYTRA) annexed to the opposition papers. Moreover, the general release executed by BURKE broadly states that it is intended to “cover the causes of action” contained within that case. As set forth above, BURKE’s complaint, at ¶16, alleges that as a result of Defendants’ negligence, he was “compelled to undergo medical aid,


treatment and attention... and since some of his injuries are of a permanent and lasting nature, he will continue to suffer similar damage in the future.”

Under the doctrine of equitable subrogation, an “insurer, having paid losses of its insured, is placed in the position of its insured. However, the carrier, as subrogee, stands in the shoes of the policyholder.” *Hunbach v. Goldstein*, 229 A.D.2d 64, 653 N.Y.S.2d 950 (2d Dept. 1997) (internal citations omitted).

In light of the foregoing, it is the opinion of the Court that a question of fact exists as to whether the settlement between BURKE and the Defendants did include some payment for medical expenses. Therefore, a hearing on this issue will be required and summary judgment must be denied. A hearing is scheduled for June 18, 2007 at 10:00 a.m. before the undersigned.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

**Dated:** April 25, 2007  
Riverhead, New York

  
\_\_\_\_\_  
EMILY PINES  
J. S. C.