

Gatto v Inservices Corp.
2009 NY Slip Op 31940(U)
August 25, 2009
Supreme Court, Richmond County
Docket Number: 101593/07
Judge: Joseph J. Maltese
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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101593/07
Motion No.:003, 004, 005, 006**

JAMES GATTO,

Plaintiff

against

**INSERVICES CORP.,
LEGION INSURANCE COMPANY,
GALLAGHER BASSETT OF NEW YORK, INC., and
AAIC,**

Defendants

AAIC,

Plaintiff

against

**JAMES GATTO, and
LEVINE & GILBERT,**

Defendants

The following items were considered in the review of these motions for summary judgment, dismissal, declaration of judgment, and leave to amend answer to include counter-claim.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 4
Notice of Cross- Motion and Affidavits Annexed	3, 8
Answering Affidavits	2, 6, 9, 11
Replying Affidavits	5, 7, 10, 12
Exhibits	Attached to Papers

In Motion #3, American Alternative Insurance Corporation (“AAIC”) moves for summary judgment to recover the full amount of a Workers’ Compensation lien pursuant to New York’s Workers’ Compensation Law (“WCL”) § 29(1). AAIC also moves for dismissal of the complaint filed by James Gatto (“Gatto”), which seeks to name either Inservices Corp. (“Inservices”), or Legion Insurance Company (“Legion Insurance”) c/o Gallagher Bassett of New

York, Inc. (“Gallagher Bassett”), and no other entity, as the carrier in Gatto’s Workers’ Compensation claim. In motion # 4, Gatto cross-moves for summary judgment on its complaint. In Motion # 5, defendant Gallagher Bassett moves for an order to declare AAIC as the Workers’ Compensation carrier for Universal Steeplejack and to dismiss Gatto’s action against Gallagher Bassett. In Motion # 6, Gallagher Bassett moves for leave to amend its answer to include a counter-claim of reformation.

Factual History

The plaintiff in the first cause of action, James Gatto, allegedly sustained serious personal injuries on December 22, 1999, when he was repairing the top of a flag pole that snapped and caused his fall. At the time of the accident, the plaintiff was working for his employer, defendant Universal Steeplejack. Subsequent to the accident, Gatto received Workers’ Compensation benefits in connection with the injuries he sustained from the accident.¹ It is alleged that defendant AAIC paid Gatto \$171,716.87 in Workers’ Compensation benefits, which was later reduced to \$113,333.13.²

A request for a Section 32 agreement identified Gatto as the claimant, InServices as the employer and Legion Insurance, c/o Gallagher Bassett as the Workers’ Compensation carrier. Paragraph 8 of the request provides in part,

All parties agree that upon the approval of this settlement, the settlement will become final, irrevocable and not subject to re-opening, reconsideration or appeal except by the written consent of both parties . . . *The settlement is final, conclusive and binding on all parties.*³

¹ Examination Before Trial of James Gatto, December 16, 2008, 7.

² Letter of Ricardo A. Baez, Attorney of AAIC to Richard A. Gilbert, Attorney for Plaintiff, August 7, 2006. AAIC exhibit J.

³ Gallagher Bassett exhibit J [emphasis added].

On May 30, 2003, the Workers' Compensation Board filed its approval of the Section 32 agreement in the amount of \$64,253.80.⁴ The notice of approval identifies James Gatto as the claimant, Universal Steeplejack as the employer, and Legion Insurance as the carrier.

Under Policy Number 20A2WC00006611-00, AAIC insured Universal Steeplejack, Inc. from September 1, 1999 to September 1, 2000.⁵ In 1997, AAIC entered into a Managing General Agency (MGA) Agreement with OccuCare USA, Inc., who later changed its name to InServices. In accordance with the agreement, InServices processed Workers' Compensation claims on behalf of AAIC.⁶ In his examination before trial, Patrick A. Foti, AAIC Vice-President of Claims, confirmed that InServices would occasionally and within its own discretion contract out claims to other managing agencies. In this instance, AAIC hired InServices to process its Workers' Compensation claims and InServices subcontracted with Gallagher Bassett to do the actual processing.⁷

Gallagher Bassett generated several forms in connection with Gatto's Workers' Compensation claim. The first three forms - dated January 5, 2000, April 25, 2000 and May 1, 2000 - list Legion Insurance as the Workers' Compensation carrier for Gatto's employer, Universal Steeplejack.⁸ In the subsequent forms dated October 4, 2000, November 13, 2000, August 16, 2001, November 2, 2001, and January 8, 2002, Gallagher Bassett identified Gatto as the injured employee, Universal Steeplejack as the employer, and AAIC as the carrier.⁹ On or

⁴ Gallagher Bassett exhibit B,

⁵ AAIC Exhibit A.

⁶ Affidavit of Patrick A. Foti

⁷ Examination before trial of Patrick A. Foti, December 16, 2008, 11.

⁸ Gallagher Bassett Exhibit D.

⁹ AAIC Exhibit C.

about January 17, 2002, Risk Enterprise Management (“REM”) replaced InServices, assuming management of AAIC policies. Found in Gallagher Bassett’s records is a Detailed Status Report dated February 13, 2003 also identifying Gatto as the employee, AAIC as the carrier, and Universal Steeplejack as the employer.¹⁰

By correspondence dated March 19, 2008, the Workers’ Compensation Board rejected AAIC’s request to modify the name of the carrier in the Section 32 agreement to reflect AAIC rather than Legion Insurance. The Board pointed out that the parties are free to negotiate an amendment of a Section 32 agreement at any time, which is then subject to the Board’s approval. Further, the Board stressed, “nearly four years had passed from the time of finalization and payment to the time of the application. Assuming *arguendo* that the Board had the jurisdictional predicate to review the application, it would be denied as extremely untimely.”¹¹

Procedural History

In Action #1, the plaintiff James Gatto filed a Verified Complaint on or about April 16, 2007 seeking to declare that the carrier of his Workers’ Compensation claim be named either Inservices or Legion Insurance. Defendant Gallagher Bassett interposed a Verified Answer on or about August 27, 2007. In Action # 2, AAIC filed a complaint against Gatto and his counsel, Levine & Gilbert, on or about September 9, 2007, seeking to recover the full amount of the Workers’ Compensation lien. Defendants in Action # 2 interposed a Verified Answer on or about September 26, 2007. Completion of Discovery was stipulated by all parties on or about February 25, 2009. A Note of Issue and Certification of Readiness was filed on March 3, 2009. On May 20, 2009, Gallagher Bassett filed its cross-motion to amend the defense of reformation.

¹⁰ Gallagher Exhibit H.

¹¹ Gatto Exhibit A.

Discussion

Leave to Amend Answer

Defendant Gallagher Bassett seeks leave to amend its answer to include a defense of reformation in order to fix the alleged mistake in the Section 32 agreement. In considering whether to grant leave to amend a pleading, the court considers the following factors: (1) whether there has been a gross delay in asserting the amendment; (2) whether the action has been certified for trial; (3) how long the amending party was aware of the facts upon which the motion was predicated; and (4) whether the movant offers a reasonable excuse for its lengthy delay.¹² The Appellate Division, Second Department has emphasized that one of the most important considerations in granting leave to amend is whether the amendment would be prejudicial by delaying the final disposition of the action.¹³

Although the instant case has already been certified for trial and Gallagher's motion for leave to amend is filed almost two years after filing its first answer, adding the defense of reformation will not delay the disposition of this case. Neither will reformation result in additional discovery or new defenses. The desired amended answer would relate to the issue at stake in both actions: AAIC's role, if any, in the Section 32 Agreement.

¹² *F.G.L. Knitting Mills v. 1087 Flushing Prop.*, 191 AD2d 533 [2d Dept 1993].

¹³ *Wechsler v. Hunt Health Systems, Ltd.*, 186 F.Supp.2d 402 [2d Cir. 2002], *citing Krumme v. WestPoint Stevens, Inc.*, 143 F.3d 71 [2d Cir. 1998].

Mutual Mistake/Reformation

New York law states that when there is no mistake about an agreement and the only mistake alleged is in the reduction of that agreement to writing, also called a scrivener's mistake, the error in that agreement may be corrected.¹⁴ Reformation of a contract, based on a scrivener's error, reforms the contract to mirror the intent of the parties. The New York Court of Appeals has established that the purpose of reformation is to restate the parties' intended terms of an agreement.¹⁵ It is at the court's discretion whether to grant or deny reformation.¹⁶ Pursuant to the New York Civil Practice Law and Rules ("CPLR") § 213(6), an action or defense based on reformation must be commenced within six years of the contractual obligation.¹⁷

The Appellate Division, Second Department held that when an innocent mistake of an application for insurance misdescribes the name of the applicant or of the insurer, the mistake is deemed mutual for purposes of reformation¹⁸ It ruled that without misrepresentation or intent to deceive, reformation is proper if both parties misdescribed the agreement.¹⁹

A copy of an insurance coverage policy was presented before this court indicating that

¹⁴ *Harris v. Uhlendorf*, 24 NY2d 463 [1969], citing *Born v. Schrenkeisen*, 110 NY 55 [1998].

¹⁵ *Lieberman v. Greens at Half Hollow, LLC*, 54 AD3d 908 [2d Dept 2008], citing *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 NY2d 211 [1978].

¹⁶ *Wells v. Yates*, 44 NY 525 [1871]; *Macaluso v. Stromer*, 160 AD2d 909 [2d Dept 1990].

¹⁷ CPLR § 213(6).

¹⁸ *Court Tobacco Stores. v. Great E. Ins. Co.*, 43 AD2d 561 [2d Dept 1973].

¹⁹ *Id.*

AAIC was the insurance carrier for Universal Steeplejack from September 1, 1999 to September 1, 2000, span that covers the day of Gatto's work related accident. Gallagher Bassett's records also demonstrate that AAIC was the carrier for Gatto's employer Universal Steeplejack. Moreover, the Associate General Counsel for Legion Insurance swore to his company's lack of involvement with Gatto's Compensation claim,

That upon reviewing my file and the claims made by the plaintiff and the co-defendants in the above matter, to the best of my ability, I have not been able to establish that Legion ever afforded workers' compensation insurance coverage to the plaintiff James Gatto or the plaintiff's employer, Universal Steeplejack, Inc. Moreover, to the best of my ability, Legion did not pay workers' compensation benefits to the plaintiff James Gatto.²⁰

Abundant evidence therefore demonstrates that a scrivener's error occurred in identifying Legion Insurance as the carrier in the Section 32 agreement. As the mistake misdescribed the name of the insurer, without any signs of misrepresentation or intent to deceive, reformation is proper to reinstate the correct identities of the parties. Since the filing of the Board's approval took place on May 29, 2003 and Gallagher Bassett filed its cross-motion to amend the defense of reformation on May 20, 2009, Gallagher Bassett's pleading is timely.

Workers Compensation Law § 32

Pursuant to WCL § 32, an employee may waive the right to compensation in exchange for an agreed and approved payment. Similar to an award in arbitration,²¹ the agreement is final and conclusive, and must be approved by the Board. Once the decision has been duly filed and approved by the Board, it is not subject to review.²²

²⁰ Affidavit of Robert Lenahan.

²¹ Minkowitz, Workers' Compensation Law §32, at 380 [64 West's McKinney's Consolidated Laws of New York Annotation 2005].

²² WCL § 32.

Notwithstanding the finality of the Board's approval, the Appellate Division, Second Department has established that reformation of insurance policies is proper "in the interest of justice, so that all parties shall have the opportunity to develop fully the proof relating to the application for and issuance of the policies, the practices of defendants and the indorsements [sic] issued by the defendants' agent."²³

In the case at bar, it is undisputed that the plaintiff received both Workers' Compensation benefits and proceeds from a Section 32 settlement. It is also undisputed that by the terms of the Section 32 agreement, Legion Insurance was the named Workers' Compensation carrier. Nevertheless, evidence from AAIC, Gallagher Bassett, and Legion Insurance prove that Legion Insurance was never an insurance carrier for Universal Steeplejack, and that Universal Steeplejack was covered by AAIC at the time of Gatto's accident. In the interest of justice, AAIC should be given an opportunity to present to the Workers' Compensation Board the necessary evidence to prove that Gallagher Bassett mistakenly identified Legion Insurance as Universal Steeplejack's Workers' Compensation carrier, and that AAIC was the actual carrier at the time of Gatto's accident.

Workers Compensation Law § 29(1)

In accordance with WCL § 29(1), the insurance carrier liable for the payment of a settlement compensation has the right to assert a lien against the proceeds of a claimant's third party action for the same injuries and consequently to offset any later award against the remaining proceeds. Absent certain circumstances not relevant in the case at bar, the New York Court of Appeals confirmed that injured persons should not receive double recoveries for basic economic losses.²⁴

²³ *Court Tobacco Stores. v. Great E. Ins. Co.*, 43 AD2d 561 [2d Dept 1973]; *contra Drummond v. Desmond*, 295 AD2d 711 [3d Dept. 2002].

²⁴ *Dietrick v. Kemper Insurance Co.*, 76 NY2d 248 [1990].

As explained above, AAIC paid both Gatto's Workers' Compensation benefits and his Section 32 settlement proceeds. However, WCL § 29(1) only allows a lien when the claimant received proceeds from a third party action. As much as AAIC may be entitled to some form of reimbursement for giving double compensation to Gatto, Gatto never filed a third party action, therefore, at this juncture, AAIC is not entitled to the lien as requested. Consequently, this Court will allow the reformation of the Section 32 agreement, but will leave it to the Workers' Compensation Board to ascertain the amount that shall be reimbursed to AAIC.

Conclusion

This court holds that Gallagher Basset erred in initially naming Legion Insurance as the Workers' Compensation carrier for plaintiff James Gatto's employer, Universal Steeplejack. In the interest of justice, all parties involved should have the opportunity to develop proof of their involvement in Gatto's claims. This court rules that it would fall within the Workers' Compensation Board's continuing jurisdiction to ascertain the correct insurance carrier and to assert a lien upon plaintiff James Gatto's claim.

Accordingly, it is hereby:

ORDERED, that defendant American Alternative Insurance Corporation's motion to recover the full amount of a Workers's Compensation lien is partly denied as the recovery amount shall be determined by the Workers' Compensation Board; and it is further

ORDERED, that defendant American Alternative Insurance Corporation's motion to dismiss the complaint filed by plaintiff James Gatto is granted; and it is further

ORDERED, that plaintiff James Gatto's motion to declare that the Section 32 agreement

not be deemed a lien upon plaintiff James Gatto's settlement proceeds is denied; and it is further

ORDERED, that defendant Gallagher Bassett of New York, Inc.'s motion for an order declaring American Alternative Insurance Corporation as the Workers' Compensation Carrier for Universal Steeplejack is granted; and it is further

ORDERED, that defendant Gallagher Bassett of New York, Inc.'s motion for an order to declare that American Alternative Insurance Corporation is the Workers' Compensation Carrier for Universal Steeplejack is granted; and it is further

ORDERED, that defendant Gallagher Bassett of New York, Inc.'s motion for leave to amend its answer to include a counter-claim of reformation is granted; and it is further

ORDERED, that the issue of American Alternative Insurance Corporation's recovery and mistaken identification in the Section 32 agreement shall be remanded to the Worker's Compensation Board to issue orders in conformance with these findings.

ENTER,

DATED: August 25, 2009

Joseph J. Maltese
Justice of the Supreme Court