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

ALICE SCHLESINGER

IA PART 16

PRESENT: SCHLESINGER Justice

PART 16

THOMAS, RALSTON

- v -

JOHN F. WALLER, M.D.,

INDEX NO. 113948/07

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: OCT 05 2009

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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RALSTON THOMAS,

Plaintiff,

-against-

JOHN F. WALLER, M.D.,

Defendant.

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Index No. 113940/07
Motion Seq. No. 001



SCHLESINGER, J.:

On October 10, 2007, the plaintiff Ralston Thomas commenced an action against defendant Dr.John F. Waller sounding in medical malpractice. The allegations of negligence concerned the failure to properly recognize and treat an ankle infection.

Neither in the Verified Complaint nor in the Verified Bill of Particulars, dated December 27, 2007, did the plaintiff request any award for medical expenses. In fact, in the latter document, specifically paragraphs 12 and 19, counsel explicitly stated that plaintiff Thomas' medical expenses "have been largely covered by private health insurance through the Oxford Health Plan, Policy #8730632*03."

Those paragraphs also included the fact that authorizations to obtain those insurance records had been sent to defense counsel. Apparently, when these authorizations were sent to Oxford, their interest was piqued and counsel for the company contacted counsel for plaintiff. This, I believe, was in January 2008. The letter was written by Steven Taylor, Senior Subrogation Analyst for The Rawlings Company, in-house counsel for Oxford. Mr. Taylor asked for information regarding the defendant's insurance carrier. It was noted in the letter that Oxford insured Mr. Thomas via a health care policy with his mother, Lorraine Thomas.

Brian Brown, plaintiff's attorney, in essence told Taylor not to bother him or his client anymore, that he was not representing Oxford's interests, and that pursuant to *Teichman v. Community Hospital*, 87 NY2d 514 (1996), the health insurer had no valid lien on any proceeds from the lawsuit. More correspondence occurred wherein counsel for Oxford attached a copy of an applicable part of Mrs. Thomas' policy which spoke of the company's right to recover when payments were made to insureds in settlements or judgments, but "only to the extent that the settlement or judgment specifically identifies amounts paid by health care services". This second letter from The Rawlings Company, this time by Scott C. Gordon, Associate General Counsel, also alluded to a clause in Mrs. Thomas' policy which stated that the insured agreed to cooperate fully to assist in protecting the company's rights under this section.

No further correspondence occurred until March 27, 2009, when Mr. Taylor sent Mr. Brown, plaintiff's attorney, an itemized statement of claims paid on behalf of Ralston Thomas. These totaled $28,718.05. Mr. Brown responded in the same vein as earlier, stating that he in no way represented Oxford's interest and would not be asking for any amounts on their behalf at trial or in a settlement.

The final letter from Rawlings, this time from Mr. Gordon dated May 19, 2009, further discussed New York law and cited the recently decided case of *Fasso v. Doerr*, 12 NY3d 80 (February 24, 2009) that deals with the subject of equitable subrogation. Plaintiff's counsel restated his opinion and continued the debate.

At the end of May 2009, shortly before a trial was scheduled to begin, the parties to the litigation reached a settlement in the amount of $175,000.00. The relevant portions of the Settlement Agreement and Release follow: plaintiff gave defendant a complete

release from any and all past, present or future claims (¶1.1); the release and discharge is a general release and defendant was not admitting any liability (¶1.4); plaintiff agreed to indemnify the defendant, its insurer, and its counsel "as to any and all liens ... including but not limited to any and all claims by the Rawlings Company, LLC on behalf of Oxford Health Plan in the amount of $28,718.05 (¶1.5); all sums set forth as payment "constitute damages on account of pain and suffering resulting from personal physical injuries or physical sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code" (¶2.2); and that $28,718.05 of the settlement amount will be set aside by defendant's insurer "until a disputed medical lien is resolved" (¶2.1).

All of the above is background for the motion brought by Order to Show Cause by counsel for Mr. Thomas, wherein he asks for the following relief:

1) approval of the May 27, 2009 settlement;

2) a determination that Rawlings on behalf of Oxford has no right to intervene or that any such right has expired or been extinguished; and

3) a determination that Rawlings/Oxford has no legally cognizable lien on the settlement proceeds.

Finally, it is important to note that Rawlings/Oxford has never sought intervention in this action. Nor have they cross-moved for such relief in response to the motion, though they are opposing the requested relief.

The parties to the present controversy only peripherally address each other's claims and arguments. For example, while plaintiff urges that intervention by Oxford should be precluded, as noted above, Oxford never has never, nor even now, sought leave to intervene.

Plaintiff argues primarily that there should be no lien on his settlement. Again, Oxford never explicitly responds to this argument. One could speculate that the reason for this silence is that case law *(e.g., Teichman, supra)* makes it clear that whatever claim or right Oxford has to reimbursement for the $28,000 they paid for medical expense claims would not be characterized as a lien on any settlement funds. The Court of Appeals deciding *Teichman* agreed with the Appellate Division in that matter and concluded that nothing in the Met Life insurance plan at issue (similar to the Oxford plan here) created a lien on the proceeds since both a legal and an equitable lien must be explicitly spelled out and must be designated to refer to specific property.

Also, one could question why in their earlier correspondence Oxford cites to *Fasso* to argue its position when it is clear that *Fasso* is readily distinguishable. *Fasso* discusses a health insurer's rights to subrogration and makes it clear that such rights cannot be extinguished by an agreement made by the parties to the litigation to which the insurer had not consented. However, *Fasso*, as I am certain counsel is aware, involved a situation where the health insurance company had sought intervention while the action was proceeding and both sides had consented to allow it.

*Fasso* was a medical malpractice action involving the need for a second liver transplant where the health insurance carrier had paid approximately $780,000 in medical expenses for Mrs. Fasso. At the commencement of the trial, the parties to the litigation settled their action for $900,000, although the defendant was insured for $2 million. Our high court found that the insurer was entitled to seek recovery of its expenditure from the $1.1 million left on the policy directly from the tortfeasor under the doctrine of equitable subrogation and that the parties' settlement did not preclude such a recovery.

However, here, Oxford is not seeking to utilize this doctrine. In paragraph 34 of the opposing affirmation, counsel specifically says that equitable subrogation cases have "no bearing on the instant matter." Why is that? Because the position of the health insurer here is based solely on an alleged breach of contract by the plaintiff, the son of the insured, and perhaps his mother, the actual insured, as well. This is clear beginning with paragraph 6 of the papers:

> Oxford's cause of action for breach of contract accrued upon the Plaintiff's receipt of the settlement corpus and subsequent refusal to reimburse Oxford.

Needless to say, this Court takes no position on the viability or merits of this contract claim, one that has never been formally espoused. Counsel for plaintiff thinks little of the argument and believes the contract language supports his position that the plaintiff owes nothing to Oxford.

Oxford has suggested (at ¶37) that the general release somehow triggered plaintiff's obligation to reimburse the insurer and that, in ways not spelled out, the plaintiff "demonstrates a clear violation of the contractual obligation to 'cooperate fully to assist us in protecting our rights under this section'" (¶38). However, it appears that the only contact Oxford has had regarding this matter is correspondence with plaintiff's counsel, who it could be (and has been) argued may be violating his ethical obligations to his client if he had facilitated payment to an entity other than his client. (See New York County Lawyers' Association Ethics Committee Opinion 739 and Disciplinary Rule 7-102, cited in Liens and Ethics: Are They Compatible? NYLJ, 8/26/09, 4:4.

Counsel for Oxford refers the Court to certain trial court decisions which are allegedly identical to this case. For example, the post-hearing decision and order by Westchester County Supreme Court Justice W. Denis Donovan, *Gulano v. Abington Square Condominium,* Index #13498/04. However, this Court notes stark differences in the facts. For example, in the Westchester action, the plaintiff commenced his action seeking recovery for personal injuries and medical expenses. As noted earlier, Ralston Thomas has never sought medical expenses in his action. Specifically, in *Gulano*, the verified complaint and bill of particulars alleged that the medical expenses were a part of plaintiff's damages. *Gulano* was thus estopped under the doctrine of judicial estoppel from arguing the opposite later on. But such was not the case here. Also in *Gulano*, nowhere in the settlement did it state that the award was for pain and suffering only, but here it did.

In the correspondence between Rawlings/Oxford and plaintiff's counsel, plaintiff suggests that CPLR §4545 is relevant to the rights of the parties. But counsel for the health insurer is correct when he argues that §4545 has no bearing on this matter. That is so because that section only relates to awards and not to those resolved by settlement. Numerous cases have so held, citing to *Teichman* in the first instance. For example, in *Boodhan v. American Home Products*, Justice Helen Freedman, (New York County, Index No. 116005/99) discusses the rationale behind this section to prevent a double recovery by a plaintiff for medical expenses and says, "However, CPLR 4545 only applies to judgments, and not to settlements."

Finally, this Court take strong issue with the sentiment expressed by counsel for Oxford in his paragraph 25 where he says:

> Plaintiff does not dispute that he took advantage of his health plan contract and directed his medical providers to bill the health plan, to Plaintiff's clear economic and medical advantage.

Plaintiff's mother, the insured under the Oxford plan, paid premiums to Oxford so that when medical bills accrued they could be submitted for reimbursement. This was not "taking advantage." This was asserting a contractual right for which she paid making her and her dependents entitled to receive benefits when incurred.

To summarize, I am granting the motion to the extent of approving the settlement entered into by the parties to the action on May 27, 2009. Also, I am determining that The Rawlings Company on behalf of Oxford has no legally cognizable lien on the settlement proceeds which thus can and should be released to the plaintiff. Further, I make no determination as to whether Oxford can intervene since no such request has ever been made. Finally, if Oxford desires to commence a new action sounding in breach of contract, that action will be decided on its merits.

This constitutes the decision and order of this Court.

Dated: October 5, 2009

OCT 05 2009

J.S.C.
ALICE SCHLESINGER

FILED
OCT 07 2009
COUNTY CLERK'S OFFICE
NEW YORK