

<b>Gatto v Inservices Corp.</b>
2010 NY Slip Op 30983(U)
April 15, 2010
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 ( <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 OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

DCM PART 3

JAMES GATTO,

Action No. 1

Index No: 101593/07  
Calendar No: 3261-007

*Plaintiff,*

*-against-*

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

DECISION & ORDER  
HON. JOSEPH J. MALTESE

-----x  
AAIC,

Action No. 2

Index No.: 103499/07  
Calendar No.: 468-008

*Plaintiff,*

*-against-*

JAMES GATTO and LEVINE & GILBERT,

*Defendants.*

-----x  
The following papers numbered 1 to 5 were submitted on these motions the 5<sup>th</sup> day of March, 2010:

	Pages Numbered
Notice of Motion for Leave to Renew by AAIC as Defendant in Action No. 1 and Plaintiff in Action No. 2, with Affirmation and Exhibits (dated October 2, 2009).....	1
Amended Affirmation in Opposition by Plaintiff in Action No. 1 and Defendant in Action No. 2, James Gatto (dated January 29, 2010).....	2
Notice of Motion for Leave to Renew in Action No. 1 by Plaintiff James Gatto, with Affirmation and Exhibits (dated January 28, 2010).....	3
Affirmation in Opposition to Plaintiff's Motion in Action No.1 and in Further Support of Motion to Renew by AAIC as Defendant in Action No. 1 and Plaintiff in Action No. 2 (dated January 21, 2010).....	4
Affirmation in Opposition to Plaintiff's Motion for Leave to Renew in Action No. 1 by Defendant in Action No. 1, Gallagher Bassett of New York, Inc., with Exhibits (dated February 10, 2010).....	5

Upon the foregoing papers, the motions are decided as indicated herein.

AAIC (the defendant in Action No. 1 and the plaintiff in Action No. 2) moves for an order pursuant to CPLR 2221(e) granting it leave to renew that part of this Court's Decision and Order dated August 25, 2009 as denied its motion for summary judgment in the full amount of its purported Workers' Compensation lien as against the proceeds of the settlement of an earlier Kings County action in which James Gatto [hereinafter "Gatto"] was a plaintiff. Gatto (the plaintiff in Action No. 1 and the defendant in Action No. 2) opposes the motion and, with co-defendant Levine & Gilbert (his attorneys herein and in the settled Kings County action), effectively cross-move pursuant to CPLR 2221(e) for an order granting him leave to renew (1) his application for summary judgment in an earlier cross motion, and dismissal of AAIC's alleged Workers' Compensation lien against the proceeds received in settlement of a third-party claim in the earlier action, entitled Gatto v. Turan, et al. (Kings County Index No. 12010/00), and (2) a declaration that Gatto is entitled to retain the full amount of his recovery in said personal injury action, both of which were also denied in the order dated August 25, 2009. AAIC and co-defendant in Action No. 1, Gallagher Bassett of New York, Inc. (hereinafter "Gallagher") oppose plaintiff's cross-motion.

Action No. 1 was commenced by Gatto's filing and service of a summons with complaint on or about April 10, 2007. Issue was joined by the service of answers by defendant AAIC on or about May 16, 2007, and co-defendant Gallagher on or about August 27, 2007. A third-party action commenced by AAIC against Levine & Gilbert under Index Number 101593/2007 was discontinued by stipulation on or about October 2, 2007<sup>1</sup>.

Action No. 2 was commenced by AAIC the filing and service of a summons with complaint on or about September 7, 2007. Issue was joined in that action by the service of an answer by defendant Levine & Gilbert on behalf of both defendants. By order dated May 1, 2008 (Minardo, J.), the actions were joined for trial. A note of issue was filed in Action No. 1 on or about March 3, 2009, but a note of issue has yet to be filed in Action No. 2.

This litigation devolves from personal injuries allegedly sustained by Gatto on December 22, 1999, when a flag pole he was repairing at 139 Basset Avenue in Kings County snapped, causing him to fall. At the time of the accident Gatto, an off-duty police officer, was "moonlighting" as a steeplejack for nonparty Universal Steeplejack Inc. (hereinafter, "Steeplejack"). Gatto subsequently received \$171,716.87 in Workers' Compensation benefits in connection with the injuries sustained

---

<sup>1</sup>By decision and order of this Court dated November 25, 2007 and entered December 3, 2007, Action No. 1 was dismissed as against defendant Legion Insurance Company. In addition, it appears that a named defendant in Action No. 1, Inservices Corp., was dissolved in bankruptcy; and has never been served or appeared in that action. Thus, the Court will *sua sponte* amend the caption to accurately reflect the remaining parties in Action No. 1.

in that accident. In addition, Gatto commenced a personal injury action in Kings County against Gerald Turano and others, which was settled on his behalf by Levine & Gilbert, Esqs, for the sum of \$800,000.00. In order to facilitate said settlement, AAIC acceded to Gatto's request to reduce its Workers' Compensation lien from \$171,716.87 to \$113,333.13 on August 7, 2006<sup>2</sup>. As is relevant, the Workers' Compensation benefits provided by AAIC from 1999-2002 were administered by co-defendant Gallagher<sup>3</sup>. Gallagher preliminarily incorrectly identified Legion Insurance Company (hereinafter "Legion") as Steeplejack's Workers' Compensation carrier<sup>4</sup>. Apparently relying upon Gallagher's initial representations, the attorneys representing Gatto on his Workers' Compensation claim finalized his case on March 5, 2003 by entering into a lump sum agreement with Legion under §32 of the Workers' Compensation Law in the amount of \$64,253.80. That settlement was subsequently approved by New York State's Workers' Compensation Board. Thereafter, Legion (a Pennsylvania insurer) was declared bankrupt, and is now out of the case<sup>5</sup>. Action No. 1 is a stakeholder's action commenced by Gatto to determine the rights of the remaining interested parties<sup>6</sup>. Action No. 2 was commenced by AAIC predicated on the claim that its right to recover "its" Workers' Compensation lien was inviolate notwithstanding the purported finality of the section 32 agreement as between Gatto and Legion.

In support of its application (Motion No. 3261), AAIC has submitted an attorney's affirmation, a copy of the prior motion and supporting papers, Gatto's affirmation in opposition, a copy of this Court's prior order, a copy of the summons and complaint in the settled Kings County action and a copy of its note of issue, as well as copies of the letters dated August 4, 2006 and August 7, 2007 regarding its agreement to reduce the lien to facilitate the settlement in Kings County. Based upon these submissions, AAIC prays that leave to renew be granted, and upon renewal, an order be issued (1) awarding it summary judgment against the defendants in Action No. 2, (2) declaring its entitlement to full recovery of its Workers' Compensation lien, and (3) dismissing of the first and second causes of action in Action No. 1.

---

<sup>2</sup>AAIC was the issuer of a Workers' Compensation policy to Gatto's employer, Steeplejack, which was in full force and effect on the date of the accident.

<sup>3</sup>AAIC actually hired Inservices Corp. to process its Workers' Compensation claims; but Inservices subsequently subcontracted with Gallagher to do the actual processing. Thereafter, on or about January 15, 2002, non-party Risk Enterprise Management assumed administration of the Workers' Compensation benefits provided under the AAIC policy with Steeplejack.

<sup>4</sup>This mistake was eventually corrected by Gallagher effective November 13, 2001.

<sup>5</sup>An order of liquidation was issued on July 25, 2003 by the Commonwealth Court of Pennsylvania.

<sup>6</sup>On 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 as the insurer of record. In so doing, the Board pointed out that the parties were free to negotiate an amendment of the section 32 agreement at any time, subject to the Board's approval. In addition, 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."

In opposition, defendants in Action No. 2 have (cross) moved (Motion No. 468) for leave to renew their prior application for summary judgment dismissing AAIC's alleged Workers' Compensation lien, and declaring that Gatto is entitled to the full amount of his recovery in the Kings County action<sup>7</sup>. In addition, these defendants have also submitted an attorneys' affirmation in opposition to AAIC's motion. In support of their cross motion seeking leave to renew, defendants have submitted an attorney's affirmation, copies of all the papers originally considered by this Court in rendering its prior determination dated August 25, 2009, a copy of said order, a copy of a letter dated March 5, 2003 from representatives of Legion, and a copy of a letter dated March 19, 2008 from the Deputy Division Chief of the Workers' Compensation Board. Based upon these submissions, Gatto and his attorneys contend that (1) renewal should be granted; (2) AAIC's motion should be denied and (3) their motion should be granted in its entirety.

In opposition, to Gatto's motion, AAIC has submitted an attorney's affirmation which contends that defendants' motion is untimely, misleading, devoid of new facts, and fails to establish that this Court misapprehended the law or the facts in denying their earlier motion. In further opposition, Gallagher also maintains that the cross motion for leave to renew is untimely, and that it should be denied based on Gatto's failure to annex copies of all of the applicable papers. Finally, Gallagher contends that the Court did not misapprehend or overlook the facts or the law in deciding Gatto's original cross motion.

It is well settled that Workers' Compensation Law §29 governs the rights and obligations of employees and compensation carriers with respect to actions arising from injuries caused by third-party tortfeasors (*see Burns v. Varriale*, 9 NY3d 207, 213). In order to prevent a double recovery by an injured employee, it is therefore provided that the compensation carrier has a right to assert a lien against the net proceeds of any recovery which the worker obtains from the offending tortfeasor in a third-party action (*see Workers' Compensation Law §29 [1]; see also Becker v. Huss Co.*, 43 NY2d 527, 537-538). In a similar vein, it has been held that the compensation carrier should not profit from an employee's recovery where it did not assume any of the costs expended in securing same (*Matter of Kelly v. State Ins. Fund*, 60 NY2d 131, 138). Thus, an equitable apportionment is routinely performed by the courts in order to ensure that injured employees receive a full measure of the net recovery in excess of the statutory benefits, and that the compensation carriers assume their fair share of the costs of litigation (*Matter of Kelly*, 60 NY2d at 138).

---

<sup>7</sup> On September 15, 2010, Levine & Gilbert, Esqs. filed a notice of appeal and request for Appellate Division intervention relative to this Court's order dated August 25, 2009. The time to perfect that appeal has since been enlarged to May, 2010.

Pursuant to Workers' Compensation Law §32, an injured employee may waive his right to compensation in exchange for an agreed and approved payment. In the instant case such an agreement was made, but with the wrong compensation carrier. In its prior determination, this Court acknowledged such error and declared AAIC as the compensation carrier for Steeplejack but declined to grant said carrier summary judgment for the full amount of its purported lien. Instead, it directed that such application be remanded to the New York State Workers' Compensation Board for determination. In addition, this Court dismissed the complaint as against AAIC in Action No.1 and denied Gatto's application to declare that the section 32 agreement with Legion is "not ...a lien upon [the] settlement proceeds from the Kings County action."

As is relevant, a motion seeking renewal shall (1) be identified as such; (2) be based upon new facts not offered on the prior motion that would change the prior determination and (3) contain reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221[e]). While the intent of the statute is directed to the production of new or additional facts extant but unknown to the movant at the time of the original motion, the rule is not inflexible. Thus, a Court, in the interest of justice and substantive fairness, may, in the exercise of its discretion, grant renewal even upon facts that were known to the movant at the time that the prior motion was made (Argento v. Wal-Mart Stores, Inc., 66 AD3d 930, 933; Rancho Santa Fe Assn. v. Dolan-King, 36 AD3d 460, 461; Wilder v. May Dept Stores Co., 23 AD3d 646, 648).

In the instant case, documentation of the Kings County settlement was not provided upon AAIC's original application because it was undisputed among the parties that Gatto had, in fact, settled the third-party personal injury action for \$800,000.00. Further, it was uncontroverted that in order to facilitate the settlement of that action, AAIC had consented to reduce its lien. For his part, Gatto attempted without success to supplement his original cross motion post-submission with a copy of a previously unavailable March 19, 2008 written rejection by the Workers' Compensation Board of AAIC's application to correct or reform the errors in the section 32 agreement entered into between Gatto and Legion. Applying the previously enumerated standards to these facts, it is the opinion of this Court that the renewal applications of both AAIC and Gatto should be granted as a matter of discretion, and considered on their merits.

Previously, this Court had properly identified AAIC as the Workers' Compensation carrier for Gatto. AAIC, now having established to the Court's satisfaction that Gatto actually commenced a third-party action in which he sought AAIC's consent reduce its lien to \$113,333.13 in order to settle the action, the latter's right to enforce such lien cannot be disputed notwithstanding the terms

of the earlier section 32 agreement. Moreover, the Workers' Compensation Board has made it abundantly clear that it will not review its May 30, 2003 approval of the section 32 agreement to reflect AAIC, rather than Legion, as Steeplejack's Workers' Compensation carrier.

Under these circumstances, and applying the applicable law (*see* Workers' Compensation law §29 [1]), it is hereby:

**ORDERED** that the respective motions for leave to renew are granted; and it is further

**ORDERED** that AAIC's motion for summary judgment is granted to the extent of declaring that it has a lien in the amount of \$113,333.13 upon the proceeds of the third-party action settled in Kings County as denominated herein; and it is further

**ORDERED** that the cross motion for a declaration that James Gatto is entitled to retain the full amount of the settlement in the Kings County action is denied and the original determination adhered to; and it is further

**ORDERED** that the complaint in Action No. 1 dismissed as against AAIC; and it is further

**ORDERED** that the caption is hereby amended to read as follows:

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

Hon. Joseph J. Maltese

-----X

JAMES GATTO,

Plaintiff,

Action #1  
Index #: 101593/07

-against-

GALLAGHER BASSETT OF NEW YORK, INC.,

Defendant.

-----X

AAIC,

Plaintiff,

Action #2  
Index #: 103499/07

-against-

JAMES GATTO and LEVINE & GILBERT,

Defendants.

-----X

and it is further

**ORDERED** that the Clerk enter judgment and mark his records accordingly.

All parties shall appear in DCM Part 3 on **May 17, 2010** at 9:30 a.m. for a status conference.

ENTER,

DATED: April 15, 2010

---

Joseph J. Maltese  
Justice of the Supreme Court