

Private Client Group v Markey
2010 NY Slip Op 31038(U)
April 15, 2010
Surrogate's Court, Nassau County
Docket Number: 342393
Judge: John B. Riordan
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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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PRIVATE CLIENT GROUP, a Division of CHARTIS
INSURANCE on behalf of COMMERCE & INDUSTRY
INSURANCE CO. and AMERICAN INTERNATIONAL
INSURANCE CO. and JOHN PERKINS,

Petitioners,

-against-

File No. 342393

GAIL MARKEY as Executrix of the Estate of JOAN KELLY,
Deceased, GAIL MARKEY, individually, GARY G. KELLY,
PAUL R. KELLY, PHILIP J. RIZZUTO, P.C. and
PHILIP J. RIZZUTO,

Respondents.

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Submitted to the court for decision is a motion by petitioners for an order pursuant to CPLR 3212 granting a conditional order of indemnity against Gail Markey as executrix of the estate of Joan Kelly and for related relief; and a cross-motion by respondents pursuant to CPLR 3211 seeking dismissal of the proceeding in its entirety.

On March 15, 2006, the decedent, while in the course and scope of her employment with Laidlaw International (“Laidlaw”) was operating a bus when she was involved in the accident that lead to her death approximately 45 days later. As a result of the accident, the ensuing injuries and her death, the decedent’s estate commenced a wrongful death action against John Perkins, the driver of the other vehicle in the accident. While no settlement agreement was presented to the court, the parties’ papers indicate that the wrongful death action was settled for \$850,000.00. As part of the settlement, the estate executed the instrument that is the subject of this proceeding.

The special proceeding before the court was commenced by a petition seeking a decree

“that the Estate is bound to defend and indemnify the petitioners herein from any and all claims arising out of the underlying wrongful death action and in particular, a claim presented by AON

Recovery on behalf of Laidlaw International against Petitioners herein as required by the indemnity agreement executed by Gail Markey as executrix of the Estate of Joan Kelly on September 15, 2008 and requiring the individual beneficiaries to disgorge appropriate funds received from the estate to cover the costs of defense and indemnity pursuant to the hold harmless agreement and to cover the costs of defending the claim presented by AON Recovery against the Petitioners and the fees, costs and disbursements associated with prosecuting this indemnity proceeding and/or for a decree requiring Philip J. Rizzuto, P.C. and/or Philip Rizzuto, as attorneys for the estate in the underlying wrongful death action to pay to the Estate sufficient sums to satisfy the Estate's hold harmless and indemnity obligations to the Petitioners herein, the fees, costs and disbursements of defending the underlying claim presented by AON Recovery and the fees, costs and disbursements associated with prosecuting this indemnity proceeding so the estate may then make whole the petitioners."

The petition alleges that Laidlaw, which was self insured, has commenced a "loss transfer" arbitration proceeding (*see* Insurance Law §5105) against petitioners seeking to recover \$50,000.00 in no-fault payments made by Laidlaw for the benefit of the decedent. The petition also alleges that the estate has agreed to indemnify and hold the petitioners harmless with respect to such claim. Verified Objections were filed on behalf of all named respondents as well as six affirmative defenses.

Petitioners are asking the court to render a declaratory judgment as to the rights and other legal relations of the parties to a justiciable controversy and related relief pursuant to CPLR § 3001 et seq. and now move for summary judgment. Respondents cross move to dismiss the petition.

The foundation of petitioners' claim is a certain "Hold Harmless Agreement," dated September 15, 2008, executed by Gail Markey, as executrix of the estate of Joan Kelly, in favor of "Defendant, John Perkins, his insurance carrier, AIG, Commerce & Industry Insurance Co.,

and American International Insurance Co., and his attorneys, Finder & Cuomo” (the “Undertaking”). Petitioners’ motion urges that the Undertaking is unambiguous, but, alternatively, if the court determines that a material term in the Undertaking is ambiguous, the Undertaking should be construed against the respondents because it was drafted by the estate’s counsel. The Undertaking provides:

“Please be advised that GAIL MARKEY, as Executrix of the Estate of JOAN KELLY, Deceased, will hold the Defendant, JOHN PERKINS, his insurance carrier, AIG COMMERCE & INDUSTRY INSURANCE CO., and AMERICAN INTERNATIONAL INSURANCE CO., and his attorneys, FINDER & CUOMO, harmless from any and all claims or liens of any nature whatsoever including, but not limited to attorneys fees, hospital bills and medical expenses, existing liens and specifically the Workers’ Compensation lien of \$84,026.80; said lien will be satisfied by the Estate without recourse to John Perkins, the AIG Private Client group or the law firm of Finder & Cuomo, LLP. Further, the Estate will bear the responsibility for any further Workers’ Compensation liens whether existing or potential, without recourse by John Perkins, AIG Private Client group and/or Finder & Cuomo, LLP.

Plaintiff, GAIL MARKEY, as executrix of the Estate of JOAN KELLY, Deceased, further agrees to indemnify the above named Defendant, insurance carrier and attorneys from any and all such claims or liens including, but not limited to, the cost of defending any litigation and/or indemnification payment that may arise from said litigation. This Agreement shall apply to any claims or liens existing as of the date of the settlement.”

Respondents’ cross-motion has several parts. First, it is asserted that the court lacks subject matter jurisdiction because under Insurance Law § 5105[b] and Workers’ Compensation Law § 29[1-a], petitioners’ sole remedy is mandatory arbitration. Second, it is urged that the “lien” has been satisfied and such satisfaction disposes of the claim, warranting dismissal. Third, the claims against Philip J. Rizzuto, P.C. and Philip J. Rizzuto individually (the “Attorney

Respondents”) should be dismissed for failure to state a claim upon which relief can be granted.

I. THE MOTION TO DISMISS PURSUANT TO CPLR 3211.

A. Lack of subject matter jurisdiction.

Respondents’ cross-motion questions subject matter jurisdiction (CPLR 3211[a][2]).

Where the parties’ papers indicate that the claim of lack of jurisdiction is substantial, jurisdictional questions should be disposed of at the threshold of the litigation (*Howard v Spitalnik*, 68 AD2d 803 (1st Dept 1979); *Hammond v Hammond*, 9 AD2d 615 [1st Dept 1959]). Where the papers are insufficient to determine whether the court has jurisdiction, there should ordinarily be a hearing where jurisdictional facts may be established (*Green Point Sav. Bank v Taylor*, 92 AD2d 910 [2d Dept 1983]; *Cato Show Printing Co., Inc. v Lee*, 84 AD2d 947 [4th Dept 1981]).

Respondents argue that petitioners’ claim is a claim under Insurance Law § 5105 which governs “loss transfers” and the sole and exclusive remedy between insurers is mandatory arbitration (*Empire Ins. Co. v Metropolitan Suburban Bus Auth.*, 159 AD2d 312 [1st Dept 1990]; *Home Ins. Co v Country-Wide Ins. Co.*, 134 AD2d 570, 571 [2d Dept 1987]; *Paxton Natl. Ins. Co v Merchants Mut. Ins. Co.*, 74 AD2d 715, 716, *affd* 53 NY2d 646 [1981]). If this proposition is correct, the arbitration panel is the proper forum for the determination of all related questions of law and fact (*Home Ins. Co v Country-Wide Ins. Co.*, 134 AD2d 570 [2d Dept 1987]; *Paxton Natl. Ins. Co v Merchants Mut. Ins. Co.*, 74 AD2d 715, 716 [4th Dept 1980], *affd* 53 NY2d 646 [1981]; *Syracuse v Utica Mut. Ins. Co.*, 83 AD2d 116, 117-118 [4th Dept 1981]) and dismissal for lack of subject matter jurisdiction is appropriate (*Kutas v New York State Employees’ Retirement Sys.*, 146 AD2d 542 [1st Dept 1989]). Respondents also claim that the case of *Doherty v Barco*

Auto Leasing Co., (144 AD2d 424 [2d Dept 1988]) is dispositive.

In response, petitioners urge that their claim is neither for a “loss transfer” nor to recover on a lien and is not governed by Insurance Law § 5105 or Workman’s Compensation Law § 29.

The question of subject matter jurisdiction is a question of judicial power, i.e., whether the court has the power, conferred by the Constitution or statute, to entertain the case before it (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]; *Hunt v Hunt*, 72 NY 217, 230 [1988]). The court may properly dismiss the proceeding *sua sponte* because of a lack of subject matter jurisdiction. Such defense is not waivable, but may be raised at any stage of the action (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]; *Robinson v Oceanic Steam Nav. Co.*, 112 NY 315, 324 [1889]).

The so-called “loss transfer” emanates from Insurance Law § 5105, entitled “Settlement between insurers”, which provides for arbitration as the sole remedy as between “insurers”. This is in accord with Workers Compensation Law 29[1-a].¹ However, while the claim by the self-insured Laidlaw against petitioners may be properly before the arbitration panel, respondents’ argument that petitioners’ hold harmless/indemnity claim under the Undertaking is so related to the “loss transfer” claim in arbitration that it is also subject to such arbitration obligation is another matter.

The *Doherty* case, relied upon by respondents, holds that an insurer who pays out first party benefits is not entitled to a lien, but is instead afforded the inter-company arbitral process under § 5105 (*Doherty v Barco Auto Leasing Co.*, 144 AD2d 424, 426 [2d Dept 1988]). The case does not address a claim by the original defendant’s insurer for indemnity or to be held harmless

¹ That section also appears to confirm the non-lien status of the \$50,000.00 no-fault portion of Laidlaw’s payments to the decedent and/or the estate.

pursuant to agreement with respect to a § 5105 arbitration claim from the Workers' Compensation insurer.

Section 5105 of the Insurance Law provides the sole remedy of a no-fault insurer to recover reimbursement of first-party benefits from another insurer (*Syracuse v Utica Mut. Ins. Co.*, 83 AD2d 116, 118 [4th Dept 1981]). The regulations promulgated by the Superintendent of Insurance (11 NYCRR 65.10) apply equally to self-insurers.

Here the respondents are not insurers, but individuals; thus, the mandatory arbitration pursuant to Insurance Law § 5105 is inapplicable and the request for dismissal for lack of subject matter jurisdiction based on a requirement of mandatory arbitration is denied.

Although not raised in the papers, the court will consider the question of whether it has the power to issue a declaratory judgment.

The Surrogate's Court is a court of limited jurisdiction, whose subject matter jurisdiction is conferred solely by the State Constitution and by statute. As to matters within its scope of jurisdiction, it has power to make complete and equitable disposition of a case. However, these powers of disposition cannot provide the surrogate with any broader jurisdictional authority than that specified in statutes (*Matter of D. D.*, 64 AD2d 898 [2d Dept 1978], *appeal dismissed* 49 NY2d 879 [1980], *appeal dismissed* 49 NY2d 916 [1980]).

The constitutional grant of jurisdiction to the Surrogate's Court provides that the Legislature cannot give to the court anything within the exclusive jurisdiction of the Supreme Court (Const. Art 6, § 12[d]). Section 201[3] of the Surrogate's Court Procedure Act states that the "court shall continue to exercise full and complete general jurisdiction in law and equity to administer justice in all matters relating to estates and the affairs of decedent..." Section 209[10]

provides that “[i]n the exercise of its jurisdiction, the court shall have all the powers that the supreme court would have in like actions and proceedings including, but not limited to, such incidental powers as are necessary to carry into effect all powers expressly conferred herein.”

Supreme Court and Surrogate's Court have concurrent jurisdiction over administration of decedent's estates, but wherever possible, all litigation involving property and funds of decedent's estates should be disposed of in Surrogate's Court (*Cipo v Van Blerkom*, 28 AD3d 602 [2d Dept 2006]). That being said, the question remains as to whether the Supreme Court has exclusive jurisdiction over declaratory judgments under CPLR 3001.

CPLR 3001 confers the power to render a declaratory judgment on the Supreme Court. According to certain commentators, the language used in CPLR 3001 excludes all other courts of original jurisdiction from entertaining this category of action (*see* Siegel, David D., McKinney's CPLR § 3001, Practice Commentaries, C3001.20 [1991]).² The language of CPLR 3001 does not expressly reference the concept of exclusive jurisdiction. It simply states that “[t]he supreme court may render a declaratory judgment...” (CPLR 3001). While it grants a power that did not exist before the 1921 adoption of the predecessor statute, there is no language to suggest that the Legislature could not grant similar power to the Surrogate's Court as appears in SCPA 209[10].

The Supreme Court's jurisdiction to entertain declaratory judgment actions is not constitutionally conferred, but rather is statutory (CPLR 3001). The Legislature has the authority, therefore, to extend jurisdiction over declaratory judgment actions to courts other than the Supreme Court. The court concludes that SCPA § 209[10] confers declaratory judgment jurisdiction on the Surrogate's Court.

² The cited commentary does not specifically address the Surrogate's Court.

SCPA § 209[10] provides that “[i]n the exercise of its jurisdiction, the [Surrogate’s] court shall have all of the powers that the supreme court would have in like actions and proceedings including, but not limited to, such incidental powers as are necessary to carry into effect all powers expressly conferred herein.” That this jurisdictional grant is broad does not completely answer the question (*see Matter of Langfur*, 198 AD2d 355, 355-356 [2d Dept 1993] (where the court held that “there is no need to address the issue of whether the surrogate’s court may also grant a declaratory judgment”).³

In *Carmel v Shor*, 250 AD2d 475, 476 [1st Dept 1998], the court held that the Surrogate’s Court could grant the relief requested, “albeit not necessarily in the form of a declaratory judgment.” The First Department relied upon the decision in *Matter of Greenwold* (236 AD2d 400, 401 [2d Dept 1997] [citations omitted]). In that case, the Second Department held:

“We find that, although ... the decedent’s widow, initiated this matter in the form of an action for a declaratory judgment in the Supreme Court, it was proper for the Supreme Court to transfer it to the Surrogate’s Court, in which there was a separate proceeding pending. The issues are relevant to the settlement of the affairs of the decedent, and the Surrogate’s Court could grant all the relief requested without issuing a declaratory judgment.”

The *Greenwold* decision is controlling. In a proceeding over which the Surrogate’s Court has jurisdiction, it can issue the equivalent of a declaratory judgment even though that discrete species of action known as the declaratory judgment action may be reserved to the Supreme Court. Under the facts and circumstance here present, the Surrogate’s Court has and will exercise subject matter jurisdiction.

³ Perhaps the Legislature should resolve this question with an express grant.

B. Lien satisfaction; lien satisfaction; documentary evidence.

CPLR 3211(a)(1) provides for the dismissal of an action based upon documentary evidence. In order to obtain such a dismissal, the defendant must establish that the documentary evidence conclusively establishes a defense to the action as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]; *see also 730 J & J LLC v Fillmore Agency, Inc.*, 303 AD2d 486 [2d Dept 2003]; *Berger v Temple Beth-el of Great Neck*, 303 AD2d 346 (2d Dept 2003]). The motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Here, respondents have submitted documentary evidence in support of their cross-motion and opposition to petitioners' summary judgment motion that arguably establishes that the "lien" claim was satisfied by the estate's payment of \$22,117.42 to AON Recovery, Inc. in October of 2008. For dismissal based upon such payment to be appropriate, however, the lien claim satisfied must be the same claim being advanced by petitioners in the subject proceeding. Petitioners couch their claim as one for indemnification with respect to the non-lien portion of the \$84,026.80 claim expressly identified in the Undertaking as a "lien." Petitioners claim that the Undertaking is not limited to lien claims, but covers "any and all claims or liens of any nature whatsoever."

The payment was not made to petitioners or any of them, but to Laidlaw's agent. The fact of such payment may be relevant to the "loss transfer" claim being arbitrated between Laidlaw and petitioners but it does not constitute a defense to petitioners' claim against the estate. The

payment defense is dismissed.

C. The claim against the Attorney Respondents.

CPLR 3211(a)(7) permits the court to dismiss an action or a cause of action contained in a pleading that fails to state a cause of action. When deciding a motion made pursuant to CPLR 3211(a)(7), the court must accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*511 West 232rd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]). The court must also give the pleader the benefit of every inference that may be drawn from the pleading (*Leon v Martinez; Dye v Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 273 AD2d 193 [2d Dept 2000]). When considering a motion made pursuant to CPLR 3211(a)(7), the court must read the complaint to determine if the plaintiff has any cognizable cause of action and not whether the cause of action has been properly plead (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *see also Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]). While the allegations in the petition are deemed true and afforded every favorable inference, legal conclusions and facts contradicted on the record are not entitled to such a presumption (*Matter of Loukoumi, Inc.*, 285 AD2d 595 [2d Dept 2001]; *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]).

Only the third cause of action is addressed to the Attorney Respondents. They are accused of failing to properly counsel their client and failing to “assure the sequestration of appropriate funds to honor the indemnity agreement.” The cross-motion argues that there is no privity of contract between petitioners and the Attorney Respondents and a claim for failure to provide

proper legal services lies solely between the retained attorney and his clients (*Shenouda v Cohn*, 17 AD3d 565 [2d Dept 2005]; *Vogel v Lyman*, 246 AD2d 422 [1st Dept 1998]); and petitioners thus lack standing to assert such a claim. Respecting the non-sequestration of funds, the Attorney Respondents argue that they had no such obligation to petitioners and further, no demand was made until four months after they had disbursed the net proceeds from the settlement to the estate.

In response, petitioners urge that Respondent Attorneys had an obligation to act in good faith which obligation would be violated “if” they took actions designed to purposely liquidate the estate without sequestering monies to honor the estate’s indemnity obligation. If such facts can be established, petitioners contend they can recover damages from the attorneys in equity. No precedent or treatise is cited in support of such a claim. The non-specific allegations of fraud set forth in ¶32 of the petition and incorporated by reference into the third cause of action by ¶56 thereof are not addressed in response to the cross-motion.⁴

Petitioners have not adequately pled a claim against the Attorney Respondents for breach of a duty of good faith. A separate cause of action for breach of the implied covenant of good faith is duplicative of a cause of action for breach of contract and, thus, New York does not recognize a separate cause of action for violation of the implied covenant of good faith and fair dealing (*Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2nd Dept 2007]; *Jacobs Private Prop., LLC v. 450 Park LLC*, 22 AD3d 347 [1st Dept 2005]). Further, the Attorney Respondents were disclosed agents for the estate and are not parties to the Undertaking. Their

⁴ The pleading must state the circumstances constituting the fraud in detail (CPLR 3016[b]).

obligations to petitioners are limited at best to compliance with the New York State Rules of Professional Conduct to the extent they create a duty in favor of a client's adversary. No such rules violation has been alleged.

The court agrees with the Attorney Respondents that there is no privity between them and petitioners. The petition is dismissed as to the Attorney Respondents.

II. THE MOTION FOR SUMMARY JUDGMENT.

A. Standard for summary judgment.

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so (*Zuckerman v City of New York*; *Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas Constr. Corp.*, 166 AD2d 401 [2d Dept 1991]).

The court's function is issue finding, not issue determination (*Matter of Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give

that party the benefit of every inference which can be drawn from the evidence (*Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]; *Groger v Morrison Knudsen Co., Inc.*, 184 AD2d 620 [2d Dept 1992]).

B. Contract construction.

Under New York law, whether a written contract is ambiguous is a question of law for the trial court (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 [1990]). An “ambiguous” word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business (*Fox Film Corp. v Springer*, 273 NY 434 [1937]; *Rochester Park, Inc. v City of Rochester*, 19 AD2d 776 [4th Dept 1963]). When the relevant language has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion, no ambiguity exists (*Breed v Insurance Co. of North America*, 46 NY2d 351, 355 [1978]).

Although the parties dispute the meaning of specific contract clauses, the court’s task is to determine whether such clauses are ambiguous when read in the context of the entire agreement (*W.W.W. Assocs.*, 77 NY2d at 163; *see also Williams Press, Inc. v New York*, 37 NY2d 434, 440 [1975]). By examining the entire contract, the court safeguards against adopting an interpretation that would render any individual provision superfluous (*see Two Guys from*

Harrison-NY, Inc. v SFR Realty Assoc., 63 NY2d 396, 403 [1984]; *see also Rothenberg v Lincoln Farm Camp, Inc.*, 755 F2d 1017, 1019 [2d Cir 1985]; *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]). Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement (*see Seiden Assoc., Inc. v ANC Holdings Inc.*, 959 F2d 425, 428 [2d Cir 1992]; *accord Metropolitan Life Ins. Co. v RJR Nabisco*, 906 F2d 884, 889 [2d Cir 1990]; *Garza v Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 [2d Cir 1988]). But, if ambiguity exists, then extrinsic evidence of the parties' intent may be looked to as an aid to construing the contractual language (*see Hudson-Port Ewen Assocs. v Kuo*, 78 NY2d 944, 945 [1991]; *O'Neil Supply Co. v Petroleum Heat & Power Co.*, 280 NY 50, 55-56 [1939]).

The fundamental rule in the construction of all agreements is to ascertain the substantial intent of the parties (*Kennedy v Porter*, 109 NY 526, 544 [1888]; *Chesapeake & O. Canal Co. v Hill*, 82 US (15 Wall) 94 [1872]). The purpose to be accomplished and the object to be advanced may be considered (*Manson v Curtis*, 223 NY 313, 320 [1918]; *Atwater & Co. v Panama R. R. Co.*, 246 NY 519, 524 [1927]) and may, if necessary, be shown by parol evidence as bearing on the consideration for the written instrument (*Hutchison v Ross*, 262 NY 381, 398 [1933]). If it is claimed by a party that a construction should be placed on the contract other than has been indicated, or any doubt arises from the writing itself, the court must look into the intention of the parties to be derived not alone from the words used but it must be read, so far as they may be ambiguous, in the light of the surrounding facts and circumstances (*Berry Harvester Co. v Walter A. Wood Mowing & Reaping Mach. Co.*, 152 NY 540 [1897]; *Wilson v Ford*, 209 NY 186, 196 [1913]), in which event parol evidence may be introduced as to those facts and circumstances, without violating the parol evidence rule (*Matter of Smith's Will*, 254 NY 283, 289 [1930]);

Mascioni v I. B. Miller, Inc., 261 NY 1 [1933]).

The Undertaking, executed as part of the settlement of the estate's claim for personal injuries and wrongful death against Mr. Perkins, contains only two paragraphs, both quoted above. Reading the provisions of the Undertaking that relate to the estate's obligation to defend and indemnify together and construing them to give effect to the reasonable expectations of the parties, it is clear that while there is no commitment to defend, there is a commitment to indemnify and hold harmless. Accordingly, petitioners' request for an order requiring the estate to defend is denied. The question remaining is whether the \$50,000.00 "no-fault" portion of the Workers Compensation claim is covered by the Undertaking,

Petitioners claim that the intent of the Undertaking is clear and that it encompasses the entire \$84,026.80 addressed in the Undertaking. They urge that the words "any and all claims" and claims of "any nature whatsoever" are all encompassing. Further, it is urged that the word "or" separating the words "claims" and "liens" is also significant. Petitioners, however, acknowledge that the \$50,000.00 "loss transfer" subject to the arbitration is not a lien and contend that the Undertaking's designation of the \$50,000.00 as part of the "Workers Compensation lien" is either of no import respecting the estate's intent or should be construed against the estate. They ask the court to conclude that "the fact that the first \$50,000.00 was paid as No-Fault benefits in lieu of Workers' Compensation benefits and the remaining \$34,026.80 was paid as Workers' Compensation benefits does not change the nature of the indemnity."

Respondents argue that the phrase "the Workers' Compensation lien of \$84,026.80" encompasses both the \$50,000.00 "no-fault" portion of that figure and the \$34,026.80 "lien" portion that was apportioned and paid pursuant to Workers' Compensation Law § 29[1] and, as

such, has been satisfied by the estate's payment of \$22,117.42 to petitioners.⁵ There is no specific mention of the loss transfer claim encompassed in the \$84,026.80 figure.

Respondents urge that the word "lien" is ambiguous and that petitioners have conceded this point.⁶ The court finds no such concession. The claim in Mr. Smith's affidavit in support of the CPLR 3212 motion that \$50,000 was added to the settlement figure with respect to the estate's execution and delivery of the Undertaking was part of settlement negotiations is inadmissible and will not be considered in support of the summary judgment motion. At best, it is properly offered as extrinsic evidence as to the parties' intent.

Petitioners cite the rule of contract construction that contract terms should be construed against the party responsible for them (*see Rentways, Inc. v O'Neill Milk and Cream Co.*, 308 NY 342, 348 [1955]). It has generally been held that "[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language" (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]; *67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249 [1975]). However, all guides to contract construction were formulated merely as aids in the basic judicial task of ascertaining the intention of the parties in the face of ambiguous or inconsistent provisions (*Matter of Schmith*, 19 NY2d 398, 402 [1967]; *Sattler v Hallock*, 160 NY 291, 297-298 [1899]). None of these rules are

⁵ Whether the lien held by Laidlaw has been satisfied seems irrelevant to the indemnification obligations asserted by petitioners. If Laidlaw's right to reimbursement has been satisfied that might constitute a defense in the arbitration between Laidlaw and petitioners.

⁶ Exhibit B to Kristen N. Reed's 12/01/2009 affirmation suggests that the entire \$84,026.80 was considered the "lien amount" and exhibit C confirms settlement of the lien amount following deduction of a proportionate share of the litigation expenses.

controlling if they defeat the intention of the parties.

Moreover, it cannot be said that petitioners “had no voice in the selection of its language.” Rather, it is uncontradicted that the initial indemnification language proposed by the estate’s counsel was rejected and the existing language was the result of negotiation between sophisticated counsel. Accordingly, the court refuses to construe the Undertaking for or against any of the parties. Further, it is preferable that the court rest its decision upon settled laws of contract construction and construe the language according to its clear meaning (*Cowen & Co. v Anderson*, 76 NY2d 318, 322 [1990]).

Petitioners’ argument is persuasive. The phrase “any and all claims or liens of any nature whatsoever” appears to encompass the entire universe of claims and liens. The doctrine of *ejusdem generis*,⁷ however, effectively limits the scope of such words where applicable and can be applied to contract construction (*Krulewich v National Importing & Trading Co.*, 195 AD 544, 546 [1st Dept 1921] [*ejusdem generis* “is not a rule limited to the construction of statutes, but is also applied in construing contracts”]; *see also Bers v Erie R. R. Co.*, 225 NY 543 [1919]; *Davids Co. v Hoffmann-LaRoche Chemical Works*, 178 App Div 855 [1st Dept 1917]; *Traylor v Crucible*

⁷ The phrase is Latin for “of the same kind,” used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, “vehicles” would not include airplanes, since the list was of land-based transportation. *See* Statutes § 239[b]. Under the *ejusdem generis* canon of statutory construction, general language in a statute is limited by specific enumerated phrases which have preceded it (*see e.g. Thoreson v Penthouse Intl.*, 80 NY2d 490, 496-497 [1992] [holding that the phrase “such other remedies” referred back to the preceding clause and should not be read as an all-encompassing grant]; *see also People v Shapiro*, 50 NY2d 747, 764 [1980]).

Steel Co., 192 App Div 445, 449 [1st Dept 1920]; *Hickman v. Cabot*, 183 Fed Rep 747, 749 [4th Cir 1910]). “It is a well-settled rule that ‘where certain things are enumerated, and such enumeration is followed or coupled with a more general description, such general description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned” (*Krulewich v National Importing & Trading Co.*, 195 AD 544, 546 [1st Dept 1921], citing *Matter of Robinson*, 203 NY380, 386 [1911]).

Applying the canon requires the court to scrutinize the things enumerated to determine whether the parties intended such enumeration to limit the general language to things of the same kind as those enumerated. The enumeration is of attorneys fees, hospital bills, medical expenses, “existing liens and specifically the Workers’ Compensation lien of \$84,026.80.” The court concludes that the loss transfer claim is of the same kind as the enumerated items, and that the loss transfer, non-lien portion of the \$84,026.80 is plainly within the intendment of the parties by reason of the specification of the \$84,026.80 figure and the language “of any nature whatsoever.” The designation of the loss transfer, no-fault portion of the \$84,026.80 as a lien is not controlling.

The court concludes that the Undertaking is not ambiguous in its reference to “the Workers’ Compensation lien of \$84,026.80; said lien will be satisfied...” even though it is conceded by petitioners that the lien amount was in fact only \$34,026.80. The estate’s intention to cover the loss transfer liability via the Undertaking is clear from the language used. Summary judgment is granted in that regard, and the court declares that the Undertaking covers the loss transfer claim currently in arbitration.

To the extent the petition seeks disgorgement from the estate’s beneficiaries, the record is insufficient to establish that any such relief is required (*see* EPTL 12-1.1[b]). Summary judgment

on that request is denied.

III. Conclusion.

The claim against the Attorney Respondents is dismissed on the merits. Petitioners' claims are also dismissed to the extent that petitioners seek to require the estate to defend the arbitration. As noted above, summary judgment is granted in so far as the court declares that the undertaking covers the loss transfer claim currently in arbitration. As to the claim against the beneficiaries, summary judgment is denied.

Settle order in accordance with the foregoing decision.

Dated: April 15, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court