Chamorro v Cole
2010 NY Slip Op 32641(U)
September 17, 2010
Supreme Court, Bronx County
Docket Number: 8116/2004
Judge: Barry Salman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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JOEL CHAMORRO, an Infant by his Mother and Natural Guardian, AISHA TORRES, and AISHA TORRES, Individually,

Plaintiffs,

Index No.: 8116/2004

-against-

DAVID COLE, M.D., SCOTT G. CHUDNOFF, M.D., RODERICK M. SANTOS, M.D., ANNE BUNDGAARD RASMUSSEN, M.D., FAITH HORTON, M.D., THE JACK D. WEILER HOSPITAL OF THE ALBERT EINSTEIN COLLEGE OF MEDICINE, A division of Montefiore Medical Center, and MONTEFIORE MEDICAL CENTER,

Defendants.
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HON. BARRY SALMAN:

Plaintiffs move to vacate Medicaid's Lien against the proceeds from this personal injury lawsuit, and for related relief.

This is an action sounding in medical malpractice, involving allegations of obstetrical negligence during the birth of the infant Plaintiff, JOEL CHAMORRO, "resulting in neurological damage, intraventricular hemorrhage with mental retardation, static encephalopathy, right brachial plexus palsy, etc."[1]

This case was settled in the amount of five million ($5,000,000.00) dollars, pursuant to terms set forth by Counsel for the parties on the record in open Court

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[1] (See Affirmation by Plaintiffs' Attorney Miklos, dated June 8, 2010, p. 4).

on March 29, 2010.[2]

The Medicaid Lien is alleged to be in the amount of $51,901.[3]

In relevant part, Counsel acknowledged the existence of the said Medicaid Lien, and that they were settling this case with the understanding "that [defendants] have no further responsibility for the" Medicaid Lien; that it was "Plaintiffs' responsibility, ultimately, to settle this Lien issue"; and that the "Medicaid Lien is anticipated to come out of the infant's share." [4]

Also, Plaintiffs agreed to "hold the defendants, defendant law firm, and the defendant insurers harmless." [5]

The Infant's Compromise Order provides that "the sum of $52,005.84 [6] ... be held in escrow pending resolution of the liens asserted by the New York City Department of Social Service, Medicaid Lien". (See Infant's Compromise Order, signed by Justice Silver, on July 16, 2010, p. 2).

In a landmark case, the United Stated Supreme Court held that a Medicaid

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[2] (See Court Transcript, dated March 29, 2010, annexed to Plaintiffs' Motion, Exhibit "F").

[3] (See Letter, dated April 17, 2010, by New York City Human Resources Administration, Department of Social Services, Division of Liens and Recovery, [NYC DSS] annexed to Plaintiffs' Motion, Exhibit "G").

[4] (See Court Transcript, dated March 29, 2010, p. 2-3).

[5] (See Court Transcript, dated March 29, 2010, p. 4).

[6] There is no explanation for the discrepancy between the $51,901 and the $52,005.84 amount.

lien "encumbers [settlement] proceeds designated as payments for medical care."[7] However, a Medicaid lien cannot be satisfied "out of proceeds meant to compensate the recipient for damages distinct from medical costs--like pain and suffering, lost wages, and loss of future earnings." Ark. HHS v. Ahlborn, 547 U.S. 268, 272 (2006).

Plaintiffs' Counsel alleges that he, and Defendants' Counsel, agreed that the instant settlement proceeds may be allocated to compensate the infant Plaintiff for past and future pain and suffering and future medical expenses, but not for past medical expenses.[8] However, parties may not avoid a Medicaid lien merely by making a self-serving declaration regarding how they wish settlement proceeds to be allocated. The Appellate Division recently directly addressed this issue, and held as follows:

> "**Even before the Supreme Court issued its decision in Ahlborn, it was settled in New York that "a Medicaid lien may not be effectively nullified by the mere expedient of the plaintiff['s] attorney announcing that the settlement relates to pain and suffering only"** (Carpenter v Saltone Corp., 276 AD2d 202, 211, 716 N.Y.S.2d 86; see Simmons v Aiken, 100 AD2d 769, 769-770, 474 N.Y.S.2d 41). The Supreme Court subsequently held in Ahlborn that federal law prohibits a Medicaid lien from being paid in its entirety from settlement proceeds before any other payments are made in the event that only a portion thereof may fairly be allocated to medical expenses. We conclude that the decision in Ahlborn does not permit a plaintiff to avoid a Medicaid lien altogether by settling with the tortfeasor for pain and suffering only. ... [I]n Ahlborn, the DSS lien

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[7] Ark. HHS v. Ahlborn, 547 U.S. 268, 284 (2006).

[8] (See Court Transcript, dated March 29, 2010, p. 2-3).

> was in fact enforced by the Court, albeit not to the extent sought by DSS. We thus conclude that the court herein, pursuant to Ahlborn, properly concluded that **a hearing is required** to determine the total value of plaintiff's loss, from which the proportionate share of DSS of the settlement proceeds may then be calculated (see Harris v City of New York, 16 Misc 3d 674, 837 N.Y.S.2d 486)." [emphasis added]

Matter of Homan v. County of Cattaraugus Dept. of Social Servs., 74 A.D.3d 1754 (4th Dept. June 11, 2010).

It is also noted that Plaintiffs do seek recovery damages for the infant Plaintiff's past medical expenses in their pleadings, despite Plaintiffs' Counsel's arguments to the contrary.[9]

Under the circumstances, it has been established that a Hearing is required "on the fair allocation of the settlement proceeds." Lugo v. Beth Israel Med. Ctr., 13 Misc.3d 681, 688-89 (N.Y. Sup. Ct. 2006). "A court determination is necessary to confirm the full value of the case and the value of the various items of damages". Id. See also Segarra v. 2805 Holdings, LLC, 2008 N.Y. Misc. LEXIS 4003, 239 N.Y.L.J. 123 (NY Sup. Ct., Bronx County, 2008, by Justice Green); Calvert v. Weiner, 2007 N.Y. Misc. LEXIS 6395, 238 N.Y.L.J. 49 (N.Y. Sup. Ct., Bronx County, 2007, by Justice Silver).[10]

Accordingly, Counsel shall appear for a Conference on October 13, 2010, in

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[9] (See e.g., Plaintiffs' Verified Complaint, dated February 10, 2004, p. 7-9, ¶¶ 30 and 40; and Plaintiffs' Supplemental Summons &Verified Complaint, dated June 7, 2004, p. 8-10, ¶¶ 35 and 45).

[10] It is noted that the attorneys who appeared in Calvert, supra, are the same attorneys who appear herein, namely, the firm of Silberstein, Awad & Miklos, and the Corporation Counsel, by Robert Hambrecht, Esq.

Room 825, at 10:30 A.M., which time the Court shall schedule the date for the Hearing; and make any other directives regarding the exchange of what "other discovery, if any, is needed to determine the allocation of damages"[11], and regarding the admissibility of evidence to be introduced at the Hearing.

Within thirty (30) days from the date of the entry of this Order, Counsel shall exchange a list of witnesses, and relevant discovery including a copy of all documents that they will introduce at the Hearing. (Counsel shall submit a copy of the same to the Court at the time of the Conference).

In this regard, for example, Plaintiffs' Counsel, Joseph Miklos, Esq., shall provide Corporation Counsel appearing for NYC DSS (Mr. Robert Hambrecht, Esq.), with a copy of the infant Plaintiff's relevant affirmed medical reports and records, and the "predicate data" upon which the "true value" of this case may be fairly calculated. See Lugo v. Beth Israel Med. Ctr., 13 Misc.3d 681, 689-90 (N.Y. Sup. Ct. 2006).

Likewise, Corporation Counsel shall provide Plaintiffs' Counsel with an itemization of the charges which comprise the subject Lien.[12]

Plaintiffs' Counsel shall forthwith serve a copy of this Order upon Counsel

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[11] See Lugo v. Beth Israel Med. Ctr., 13 Misc.3d 681, 689-90 (N.Y. Sup. Ct. 2006).

[12] This is relevant since the Lien Letter states that the amount of the Lien may be reduced by any charges which were for educational purposes or early intervention services. (See Letter, dated April 17, 2010, by NYC DSS, annexed to Plaintiffs' Motion, Exhibit "G").

for the Defendants (the firm of McAloon and Freedman), as well as upon Corporation Counsel appearing for NYC DSS (Mr. Robert Hambrecht, Esq.); and shall telephone both Counsel to advise them of the date of the Conference. At the time of the Conference, Plaintiffs' Counsel shall provide the Court with an "Affidavit of Service" showing compliance herewith.

This constitutes the decision and Order of this Court.

Dated: September 17, 2010

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Barry Salman, J.S.C.