

**Butkow v City of New York**

2011 NY Slip Op 30582(U)

March 11, 2011

Sup Ct, New York County

Docket Number: 112090/05

Judge: Judith J. Gische

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

PRESENT: GISCHE  
HON. JUDITH J. GISCHE Justice

PART 10

PAMOLA BUTKOW  
- v -  
CITY OF NY

INDEX NO. 112090/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 4  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

MAR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

MAR 11 2011

Dated: 3/11/11

J. GISCHE  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X

Pamela Butkow,

Plaintiff (s),

**-against-**

City of New York, Republican National  
Committee, Turner Construction Company,  
Universal Building Supply, Inc., and  
New York City Host Committee-2204,

Defendant (s).

-----X

**DECISION/ ORDER**  
Index No.: 112090/05  
Seq. No.: 004

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

**MAR 14 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltff's OSC (extinguish lien) w/ BPH affirm, exh . . . . .	1
Aetna Life opp w/KRM affirm, exhs . . . . .	2
Universal Building opp w/SC affirm, exh . . . . .	3
Aetna supp response w/KRM affirm, SMS affid (as exh) . . . . .	4
Pltff's reply w/BPH affirm . . . . .	5

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

The underlying action for personal injuries has been settled, in the principal sum of \$600,000. Plaintiff Pamela Butkow's ("Butkow") employer provided her with medical insurance. Plaintiffs' employer, Neiman Marcus, ("employer") has now made a claim for repayment of the medical expenses it paid on her behalf. Presently before the court is Butkow's motion for an order extinguishing any subrogation claim and/or lien that her employer may have or seek to assert against her. The employer opposes the motion on the basis that it is without merit and premature. Defendant Universal Builders Supply,

Inc. ("Universal") takes no position on the motion, but only states that regardless of the outcome of plaintiff's motion, Universal bears no responsibility for any portion of the lien, based upon the General Release Butkow executed, dated December 9, 2010.

### **Background and Arguments Presented**

After Butkow's case was settled, plaintiff's counsel was notified that Neiman Marcus, Butkow's employer, was asserting a claim for reimbursement of the more than \$133,000 it had paid in medical expenses on Butkow's behalf. Neiman Marcus provided Butkow with medical insurance through a Preferred Provider Organization Medical Plan ("PPO"). According to the benefits booklet provided, the PPO is self administered by Neiman Marcus, Aetna Life Insurance Company provides administrative services, and the Rawlings Company, LLC is the subrogation vendor for Aetna Life Insurance Company. These companies are collectively hereinafter referred to as the "respondents."

Respondents claim that the PPO is subrogated to (i.e. is the subrogee) of Butkow's rights against third parties and, therefore, respondents have the right to recover the medical expenses they paid on her behalf because the PPO is a self insured employee benefit plan, as that term is defined under section 514 of ERISA.

In support of this motion, plaintiff argues that under New York State law, when a plaintiff settles a personal injury action with one or more defendants, a benefit provider is not entitled to a lien or reimbursement for benefits it paid, because it is "conclusively presumed that the settlement does not include any compensation for the cost of health care services, loss of earnings, or other economic loss (General Obligations Law § 5-335) ("GOL § \_\_"). Furthermore, the term "Benefit Provider" is defined in this section of the GOL to include "any insurer, health maintenance organization, health benefit plan [etc.] or

any other benefits under a policy of insurance or contract with an individual or group” (GOL § 5-101). Thus, according to plaintiff, by law, respondents have no right to recover the monies they expended for Butkow’s medical treatment from any part of the settlement proceeds.

In opposition, respondents argue that state laws that relate to or affect employee benefit plans are preempted by federal law under section 514 of the Employee Retirement Income Security Act (“ERISA”) and, furthermore, that self-funded ERISA plans are exempt from state regulations because such plans are not deemed to be insurance companies or insurers engaged in the business of insurance for purposes of state law. The respondents have provided a copy of the plan documents showing that the plan is funded from the employer’s general assets and benefits are paid from employee contributions, as applicable.

Alternatively, respondents argue that plaintiff’s motion is premature as it seeks relief that is not ripe for consideration by this court. They contend all they did was serve a letter demand, but they have not (as of yet) taken any legal action against the plaintiff. Respondents argue further that they were not named parties to this action and, in any event, even were the respondents to commence an action it would have to be in federal court pursuant to 29 USC § 1132 (a) (3) which pertains to Civil Enforcement by a participant, beneficiary, or fiduciary to enjoin any practice which violates any provision of this title (ERISA) or the plan or “to obtain other appropriate equitable relief.”

### **Discussion**

At the outset, it bears noting that none of the respondents were named defendants in the underlying personal injury action. None of them moved to Intervene in this action before it was settled (see Gramieri v. The City of New York, 8 Misc3d 1028 [Sup Ct N.Y. Co. 2005]) and respondents have not commenced any legal action against plaintiff. Thus, plaintiff seeks injunctive relief (or possibly a declaratory judgment) against non-parties which have asserted no claims against them. Pursuant to CPLR § 6311, injunctive relief is available only upon notice to the defendant served together with the summons. Consequently, Butkow's motion, seeking to restrain respondents' conduct before the underlying merits of their claims have been fully litigated, is entirely premature.


Furthermore, in an action for a declaratory judgment, the parties seek a determination of their respective rights by the court. Here, there is no complaint for a declaratory judgment and, therefore, were the court to decide the parties' dispute, It would be issuing what is, in effect, an advisory opinion, something which a court may not do.

Although plaintiffs argue that the issue of whether the settlement proceeds that plaintiff received in this action may be the subject of a lien or claim by a medical insurance provider is ripe for adjudication, the court disagrees. There is simply no basis for the court to rule on such an important issue on an advisory basis.

For these reasons, plaintiffs' motion is denied. Any relief not expressly addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York  
March 11, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
MAR 14 2011  
NEW YORK  
COUNTY CLERK'S OFFICE