

Beers v A.C.&S., Inc.
2011 NY Slip Op 32080(U)
July 27, 2011
Sup Ct, NY County
Docket Number: 017138/89
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Lack Beers

- v -

AC & S Inc

INDEX NO. 017138 / 89¹⁹

MOTION DATE _____

MOTION SEQ. NO. 004

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the
memorandum decision dated 7.27.11

FILED

JUL 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7.27.11

HON. SHERRY KLEIN HEITLER *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: PART 30

----- X

JACK BEERS, et al.,
as to sub-plaintiff Cornelius Barry

Index No. 017138/89
Motion Seq. 004

Plaintiff,

DECISION AND ORDER

-against-

FILED

A.C. & S., Inc., et al.,

JUL 28 2011

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff Cornelius Barry's motion pursuant to Workers' Compensation Law § 29(5) for an order compromising and settling the claims in this third party action, *nunc pro tunc*, is granted without opposition and for good cause shown.

BACKGROUND

This motion was filed by Cornelius Barry ("Plaintiff"), a sub-plaintiff in this asbestos-related personal injury case. The underlying action was filed on July 1, 1989. Plaintiff was diagnosed with asbestosis on or about April 9, 1987, and was advised by his doctor that such disease resulted from his occupational exposure to asbestos as an ironworker at job sites located throughout New York State. Plaintiff's counsel engaged in discovery and entered into settlements on behalf of Plaintiff for almost a decade. A closing statement was filed in or about December of 1997. During that time period settlement agreements were reached with over thirty defendants in the amount of \$55,629.00. Settlements were also reached for additional sums with nonnegotiable settlement trusts established pursuant to § 524(g) of the United States Bankruptcy

Code.

Plaintiff filed his case with the Workers' Compensation Board ("WCB") on or about May 3, 1994, such case pertaining to his asbestosis, chronic obstructive pulmonary disease, and chronic irritative bronchitis. Atlantic Mutual was established as the insurance carrier for Mr. Barry's claim in or about 2006 or 2007.

Plaintiff's workers' compensation case was dismissed on September 28, 1999, reinstated, and dismissed again on January 29, 2007. Sometime in 2010, Plaintiff's counsel was informed that Plaintiff's case had been reinstated a second time after an appeal. The WCB then requested proof of approval from Plaintiff's insurance carrier of all settlements in this action. Plaintiffs' counsel informed the WCB that it was unable to locate the majority of Plaintiff's file.

Plaintiff contends that it could not have received approval from Atlantic Mutual because it did not become Plaintiff's workers' compensation insurance carrier until 2006 or 2007, long after Plaintiff's lawsuit had been concluded. Plaintiff asks the court to approve all settlements previously entered into by the parties to this action, *nunc pro tunc*, in accordance with Workers' Compensation Law § 29(5). The Order to Show Cause on this motion was duly served upon Atlantic Mutual on April 15, 2011. Plaintiff's motion remains unopposed.

DISCUSSION

Under Workers' Compensation Law § 29(5), a claimant is authorized to settle a lawsuit which arises out of the same incident as his or her workers' compensation claim "provided that the petitioner obtains either the carrier's prior consent to the settlement or the approval of the court in which the third-party action is or was pending, within three months after the case has been settled." *Stiffen v CNS Ins. Companies*, 282 AD2d 991, 992 (3d Dept 2001); *accord Merrill*

v Moultrie, 166 AD2d 392, 392 (1st Dept 1990). Should a claimant fail to obtain either carrier or court approval, he/she will be barred from further receipt of workers' compensation benefits.

Merrill, supra, 166 AD2d at 292; *Stiffen, supra*, 282 AD2d at 992. A judicial order may be obtained *nunc pro tunc* approving a previous settlement, even if more than three months have passed since the settlement, if it is established that the amount of the settlement is reasonable, the delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and the carrier was not prejudiced by the delay. *See id.*

The purpose of Workers' Compensation Law § 29(5) is "not to trap unwary litigants or their counsel into an unwitting forfeiture of workers' compensation benefits," (*Wiechec v Dolina*, 29 Misc.3d 1234(A), 920 NYS2d 245, at *5 [Sup. Ct. Erie Co. Dec. 14, 2010]), but to "prevent imprudent settlements of suits by the employee or his estate to the prejudice of the employer's (or carrier's) subrogated rights." *Meachem v New York Cent R. Co.*, 8 NY2d 293, 297 (1960).

Here, Plaintiff has satisfied the requirements for *nunc pro tunc* approval of his prior settlements in this action. *Merrill, supra; Stiffen, supra*. The settlements are reasonable in light of the financial condition of the defendants involved, especially those defendants whose assets are protected by trusts, and the relatively limited nature of Plaintiff's injuries. There is no evidence that Plaintiff engaged in any dilatory tactics or otherwise acted unreasonably.

Plaintiff's workers' compensation case was not reinstated until 2010, and it is undisputed that Plaintiff's counsel made every effort to locate the relevant documents prior to filing this motion. There is no reason to believe that Atlantic Mutual will suffer any prejudice. Indeed, Atlantic Mutual has chosen not to oppose Plaintiff's *nunc pro tunc* request. In any event, Atlantic Mutual has not made any payments in connection with Plaintiff's workers' compensation claim nor has

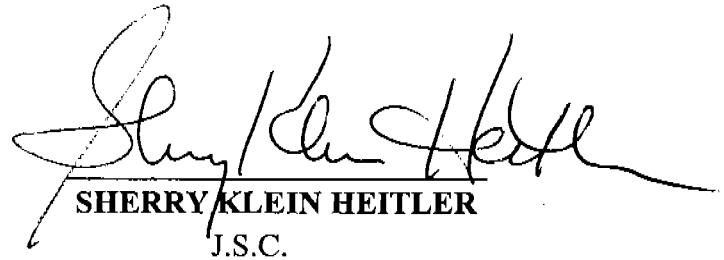
the WCB granted Plaintiff any monetary award to date. Further, Atlantic Mutual will be entitled to a credit towards future workers' compensation benefits for an amount up to the net settlement proceeds received by Plaintiff from the third-party action. Workers' Compensation Law § 29(4); *see also Matter of Brisson v County of Onondaga*, 6 NY3d 273, 277 (2006); Minkowitz, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 64, Workers' Compensation § 29, at 196-97.

Accordingly, it is hereby

ORDERED that all settlements previously entered into by the parties to this action are hereby approved, *nunc pro tunc*, in accordance with Workers' Compensation Law § 29(5).

This constitutes the decision and order of the court.

DATED: July 27, 2011


SHERRY KLEIN HEITLER
J.S.C.

FILED

JUL 28 2011

NEW YORK
COUNTY CLERK'S OFFICE