

<b>Kilroy v A.C. &amp; S. Inc.</b>
2011 NY Slip Op 33501(U)
December 28, 2011
Supreme Court, New York County
Docket Number: 104148/97
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER

PART 30

*Justice*

*William Mistofsky*

INDEX NO.

104148/97

MOTION DATE

MOTION SEQ. NO.

03

MOTION CAL. NO.

*A.C. + S Inc, (con Ed)*

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 denied*

*as per the memo decision  
of 12-28-11.*

**FILED**

JAN 04 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12-28-11

*[Signature]*  
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  
MARTIN P. KILROY

as to sub-plaintiff WILLIAM MISTOFSKY,

Plaintiffs,

-against-

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

Defendants.  
----- X

Index No. 104148/1997  
Motion Seq. 003

DECISION AND ORDER

**FILED**

**JAN 04 2012**

**SHERRY KLEIN HEITLER, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

This petition was brought by plaintiff's executor, Ms. Catherine Humphreys ("petitioner"), pursuant to Workers' Compensation Law ("WCL") §29(5), for an order partially compromising and settling the claims in plaintiff's third party action, *nunc pro tunc*.

Plaintiff William Mistofsky, now deceased, was employed by Consolidated Edison Co. of New York Inc. ("Con Edison") from 1950 until approximately June 1996. He was diagnosed with asbestosis on or about June 19, 1996. In or about August 1996, he filed an asbestos-related workers' compensation claim against Con Edison, which company is self-insured, with the New York State Workers' Compensation Board ("WCB"). Thereafter, his counsel reached settlement agreements with more than 40 defendants in the within action totaling \$63,204.33. Settlements for additional sums were also reached with nonnegotiable settlement trusts established pursuant to § 524(g) of the United States Bankruptcy Code. It is undisputed that to date Con Edison has yet to pay any benefits in connection with Mr. Mistofsky's workers' compensation claim.

On April 12, 2011, after several decisions and appeals, the WCB issued a Memorandum of

Board Panel Decision in which it held that it “cannot conclude that consent was given in settlements against AC&S, B&W Pi Trust, Bankruptcy- H.K. Porter Asbestos Trust or CCR-1998 New York” and directed the claimant to produce proof of consent or a *nunc pro tunc* order with regard to same. Counsel was unable to obtain consent for these settlements from Con Edison, prompting this application.

Petitioner contends that Con Edison did in fact consent to the settlements at issue herein. In the alternative petitioner contends that a *nunc pro tunc* order approving the settlements is warranted given the reasonableness thereof and lack of prejudice to Con Edison. Con Edison argues, among other things, that the court lacks jurisdiction to consider the motion because neither Mr. Mistofky’s executor nor Con Edison are parties to the within action. Con Edison also submits that it did not consent and the settlements at issue were not reasonable and thus not appropriate for *nunc pro tunc* approval since petitioner now seeks further relief from Con Edison in addition to that which it recovered from the defendants.

### **DISCUSSION**

Under WCL §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.” *Stiffen v CNS Ins. Companies*, 282 AD2d 991, 992 (3d Dept 2001); *see also Merrill v Moultrie*, 166 AD2d 392 (1st Dept 1990). If a claimant fails to obtain either carrier or court approval, it 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 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 Jackson v City of New York*, 70 AD3d 694 (2d Dept 2010); *Miszko v Gress*, 191 Misc.2d 229 (S. Ct. Ulster Co. 2002).

Con Edison argues that this court lacks jurisdiction to consider the motion at bar because neither Mr. Mistofsky's executor nor Con Edison is a party to the action. Indeed, the plaintiff in the case as now captioned is deceased. However, Catherine Humphreys was appointed executor of William Mistofsky's estate on March 4, 2010 and thus has standing to pursue claims on the decedent's behalf. While the case caption may erroneously not have been amended to reflect this qualification, it is undisputed that this action has been on the New York City Asbestos Litigation ("NYCAL") deferred docket since it was filed, and despite the oversight in amending the caption of this case, all claims thereunder have been resolved except those involving certain pending asbestos bankruptcy trusts. While the court finds that an amendment of the within caption should be filed and served, it does not require additional motion practice.<sup>1</sup>

Con Edison also mistakenly relies on the fact that it is not a party to the underlying action since, as the decedent's employer, Con Edison is generally not subject to suit. *See* WCL §11. However, Con Edison may be made a party to a special proceeding for the type of relief sought herein (*see* WCL §29[5]), the petition for which may be brought on, as it was here, by Order to Show Cause (*see* CPLR 5403[d]). In this instance, petitioner's failure to appropriately purchase a new index number and correct the caption is a non-prejudicial oversight which the court may permit to be corrected. CPLR 2001; *see e.g., McLeod v County of Nassau*, 75 AD3d 57, 62 (2d Dept 2010).

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<sup>1</sup> *See* NYCAL Case Management Order ("CMO") dated September 20, 1996 as amended May 26, 2011, Section VI(E), which provides in relevant part: "Any plaintiff may, without further leave of the Court, amend his or her complaint to add claims based on survivorship, death of the original plaintiff...."

Indeed, here, as in *Matter of McCaffrey*, 225 AD2d 981, 982 (3d Dept 1996), “[a]lthough there is a lack of technical compliance, most of the required information is contained in the record. As we have previously noted, ‘the Workers’ Compensation Law should be liberally construed in favor of the employee and an overly legalistic approach thereto should be avoided. . . .’” (Citations omitted.)

Substantively, while the record is unclear as to whether Con Edison consented to the settlements at issue, in the circumstances of this case I find that a *nunc pro tunc* order settling such claims is warranted. As set forth in *Stiffen, supra*, 282 AD2d at 992, such relief is warranted where the petitioner “can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the petitioner’s fault or neglect, and (3) the carrier was not prejudiced by the delay. . . .” (Citation omitted.)

First, with regard to the issue of reasonableness, Con Edison faults petitioner for failing to show what the available policy or trust limits were for each defendant. However, this omission is not fatal given Mr. Mistofsky’s medical report, which shows that his injuries were limited to pleural scarring, and given the uncertain financial condition of the defendants involved, especially those defendants whose assets are protected by trusts.

Second, there was no delay in applying for this compromise order. While Con Edison argues that plaintiff effectively prolonged this petition for more than 11 years, the fact is that this application was filed on June 27, 2011, a little more than two months after WCB’s April 12, 2011 decision. There was no reason to bring this application before then.

Third, Con Edison was not prejudiced. There is no dispute that Con Edison was at all times aware of the relevant facts and circumstances surrounding the settlement of Mr. Mistofsky’s claims. Moreover, Con Edison will be entitled to a credit towards future workers’ compensation benefits

payable to petitioner in amounts up to the net settlement proceeds received by Mr. Mistofsky's estate arising from his third-party action. See WCL §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), and it is further

ORDERED that plaintiff's counsel is directed to purchase a new index number under which this and all further proceedings involving Mr. Mistofsky's workers' compensation claims shall be filed, and it is further

ORDERED that the caption of such new proceeding shall read as follows:

**CATHERINE HUMPHREYS, as Executor of the Estate  
of WILLIAM MISTOFSKY,**

**Petitioner,**

**- against -**

**CONSOLIDATED EDISON OF N.Y., Inc.,**

**Respondent.**

and it is further

ORDERED that plaintiff shall file under such new index number a copy of this order and the papers herein, as well as a copy of the pleadings from plaintiff's original 1997 action brought under Index No. 104148/1997, and it is further

ORDERED that plaintiff's counsel shall amend the caption of the within action to reflect the

substitution of the estate of Mr. Mistofsky as plaintiff, pursuant to the CMO; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records accordingly.

This constitutes the decision and order of the court.

**FILED**

**JAN 04 2012**

DATED: 12-28-11



NEW YORK  
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER  
J.S.C.