

**Liberty Mut. Group v Kroll**

201F NY Slip Op 31 €FG(U)

December FI , 201F

Sup Ct, Richmond County

Docket Number: 100601/10

Judge: John A. Fusco

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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LIBERTY MUTUAL GROUP a/s/o  
DORMITORY AUTHORITY,

DCM Part 4

Plaintiff(s),

Present:  
Hon. John A. Fusco

-against-

**ORDER**

ELIZABETH KROLL,

Index No.: 100601/10

Defendant(s).

Motion No.: 990-001

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The following papers numbered 1 to 2 were marked fully submitted on this 15<sup>th</sup> day of November, 2011:

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause by Plaintiff(s) with supporting Papers & Exhibits (dated March 17, 2010).....	1
Various Letters and Correspondence Submitted by Defendant Kroll.....	2

Upon the foregoing papers, the motion is granted to the extent herein indicated.

Plaintiff brought this Order to Show Cause to compel defendants to satisfy a workers compensation lien. The lien arose from the payment of medical expenses and payments to defendant Elizabeth Kroll for a work-related injury that occurred on September 6, 2000. Ms. Kroll had applied for and was paid workers compensation benefits totaling \$185,332.39 from the insurer of the Dormitory Authority of the State of New York, Liberty Mutual. In her personal injury action for the same injury, Kroll v State of New York, Ms. Kroll was awarded damages in the amount of \$391,500 plus interest from the State of New York. The past damages award was allocated to her pain and suffering and loss of earnings only, and the future damages award was

allocated toward medical expenses, pain and suffering and lost wages portion of the award.

After the award was distributed, Ms. Kroll's counsel in the underlying action, defendant Joel S. Levine, Esq. retained funds in escrow in the amount of \$121,846.10 in anticipation of settling the subject lien. Defendant however, would not permit her counsel to release the funds to plaintiff and thus, plaintiff filed this order to show cause. Mrs. Kroll has objected to the lien and refused to reimburse plaintiff. Ms. Kroll asserts since the award in the underlying action did not include medical expenses plaintiff is not entitled to reimbursement of that amount. Ms. Kroll also refused reimbursement to plaintiff for the lost wages portion, citing the absence of any specific allocation for that portion of the lien in the court decision.

The court sought resolution of this motion and conferenced this matter on several occasions with all parties. At such conferences, plaintiff was unwilling to reduce its lien and defendant was likewise unwilling to release the funds held in escrow by Mr. Levine. At this time, Ms. Kroll also expressed concerns that: (1) Liberty Mutual had stopped payments pursuant to the Workers Compensation Decision; and (2) she received a 1099 on the imputed interest amount in the decision. Ms. Kroll requested that the Court order the elimination of the lien, plaintiff continue its monthly payments and that her counsel, Mr. Levine, pay the taxes on her award.

Pursuant to Workers' Compensation Law § 29, where an injured worker brings a third-party action, the compensation carrier is entitled to enforce its lien, with interest, against

“the proceeds of any recovery from such [third party], whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such ... carrier”

Workers Compensation Law § 29 also provides the employer with the right to offset a claimant's future compensation benefits with the proceeds of any recovery. Brisson v. Vounty of

Ononodaga, 6 N.Y. 3d 273 (2006).

In accordance with this §29, the motion is granted as Ms. Kroll has not put forth a meritorious defense and plaintiff is entitled to enforce its lien against the award as it was allocated to medical expenses and lost wages.

The damages award in Kroll v. The State of New York was allocated as follows:

- (1) Past Damages: \$200,000 in pain and suffering, plus \$539,000 in lost wages, and no medical expenses.
- (2) Future Damages: \$450,000 in pain and suffering, plus \$308,000 in lost wages, and \$69,000 for medical expenses.

Of this total amount, plaintiff recovered only twenty-five percent, the amount attributable to the State of New York. The remaining seventy-five percent was attributable to Ms. Kroll's contributory negligence. One-third of the award was paid to her counsel in the Kroll v. The State of New York in the amount of \$148,607.26 and \$4,718.10 was paid to her counsel for disbursements.

The allocation is as such: as to her past damages, Ms. Kroll was awarded \$134,750 for her past lost wages and no medical expenses; as to her future damages, Ms. Kroll was awarded \$77,000 in future lost wages and \$17,250 in future medical expenses.

Plaintiff's lien totals \$185,332.39. Plaintiff paid \$138,955.60 in lost wages: \$132,583.60 through the decision date of October 31, 2008 and \$6,372.00 from November 1, 2008 to March 6, 2009. Plaintiff paid \$46,376.79 in medical expenses, \$46,263.46 through October 31, 2008 and \$114.33 paid after October 31, 2008.

Taking the above into account, plaintiff's lien for the past lost wages of \$132,583.60 is payable out of the award, minus attorney's fees and disbursements and that portion of the lien is extinguished., The portion of the lien requesting past medical expenses is extinguished in the

amount of \$46,263.46, as there was no award for past medical expenses, and plaintiff did not object nor intervene to protest this issue in the Court of Claims. As to future damages, plaintiff is entitled to \$114.33 for future medical expenses and \$6,372.00 in future lost wages, for a total of \$6486.33, minus attorneys' fees and disbursements. This allows plaintiff a total lien of \$139,069.93, plus 22 months in interest totaling \$22,946.44 equaling \$162,016.37 subtracting \$1,698.52 in disbursements and \$53,498.61 in attorneys fees for a total of \$106,819.24 Further, plaintiff ceased Ms. Kroll's weekly disbursements after March 6, 2009 and through the present day, which entitles Ms. Kroll to a credit of \$52,038 bringing the total of the lien to \$54,781.24.

Accordingly it is hereby

ORDERED, that the motion of plaintiff is granted to the extent that that defendant Joel Levine, Esq., will remit the amount of \$54,781.24 to plaintiff as payment on the Workers Compensation Lien within twenty (20) days of the service of this order with notice of entry upon Joel Levine, Esq. and Ms. Kroll; and it is further

ORDERED, that Joel Levine, Esq. will release the remaining funds to Ms. Kroll thirty (30) days after service of the order with notice of entry upon him

ORDERED, that the motion is otherwise denied.

Dated: December , 2011

E N T E R

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Hon. John A. Fusco  
Justice of the Supreme Court