

**Kouadio v Hereford Ins. Co.**

2012 NY Slip Op 30632(U)

March 14, 2012

Sup Ct, NY County

Docket Number: 100102/12

Judge: Cynthia S. Kern

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*3/15/12*  
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
*Justice*

PART 55

KOFFI KOVADIO

INDEX NO. 100102/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -

Hereford Insurance Co.

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 \_\_\_\_\_

PAPER#	NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed decision.*

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

**FILED**

**RECEIVED**

**MAR 15 2012**

MAR 15 2012

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/14/12

egk  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
KOFFI KOUADIO,

Petitioner,

Index No. 100102/12

-against-

DECISION/ORDER

HEREFORD INSURANCE COMPANY,

**FILED**

Respondent.  
-----X

MAR 15 2012

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_  
NEW YORK COUNTY CLERK'S OFFICE

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>      </u>
Replying Affidavits.....	<u>      </u>
Exhibits.....	<u>3</u>

Petitioner Koffi Kouadio brings the instant motion seeking *nunc pro tunc* consent to settlement of a personal jury lawsuit pursuant to Workers' Compensation law 29(5). For the reasons set forth more fully below, petitioner's motion is denied.

The relevant facts are as follows. On or about October 29, 2003, petitioner was injured when driving a taxicab in the course of his employment. He brought a Workers' Compensation claim. Respondent Hereford Insurance Company ("Hereford") is the workers' compensation carrier. To date, Hereford has paid \$7,226.90 to petitioner for medical expenses. On or about August 11, 2006, petitioner settled his third-party action against the driver of the car which hit

him, for \$2,000. Petitioner did not seek Hereford's consent to this settlement. On May 21, 2009, petitioner filed a Request for Further Action with the Workers' Compensation Board, seeking a hearing to litigate the issue of whether his alleged injuries were permanent. The Workers' Compensation Board closed the claim on March 2, 2010 on the basis that the third party action was settled without Hereford's consent. This motion was brought in December 2011.

Pursuant to Workers' Compensation Law §29, a workers' compensation carrier has a lien on any recovery of damages arising out of the underlying accident except as to "first party benefits" which another insurer would have otherwise been obligated to pay under New York's no-fault insurance law. First party benefits are those paid for basic economic loss or up to \$50,000 per person for certain medical and other reasonable and necessary expenses as well as lost earnings for three years from the date of the accident. A claimant who settles a third-party action for less than the compensation benefits paid or payable under the Workers' Compensation Law must obtain the written consent of the workers' compensation carrier or obtain an order on notice from the court within three months of the settlement, approving it. The Court of Appeals has held that such written consent is required even if the carrier does not have a lien on the settlement proceeds. *Brisson v County of Onondaga*, 6 N.Y.3d 273, 279 (2006).

A court may order *nunc pro tunc* approval of such a settlement after more than three months have passed if 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." *Medina v Phillips*, 88 A.D.3d 524, 525 (1<sup>st</sup> Dept 2011). In *Williams v New York City Transit Authority*, the First Department refused to approve such a settlement *nunc pro tunc* where petitioner "provided

no satisfactory explanation for waiting 1 ½ years to seek approval..." 27 A.D.3d 302 (1<sup>st</sup> Dept 2006). Moreover, the *Williams* court pointedly stated that "the absence of any justification for the delay is particularly glaring in view of the circumstance that during the post-settlement period... petitioner was vigorously pursuing Workers' Compensation disability benefits... in an amount potentially considerably in excess of the settlement amount." *Id.* Similarly, the courts have found that where the petitioner waited as little as 11 months after a specific finding on the part of the Workers' Compensation Board that such consent was required to bring a *nunc pro tunc* application for consent, such delay was the result of petitioner's "neglect or fault." See *Wilbur v Utica Mut. Co.*, 228 A.D.2d 928 (3<sup>rd</sup> Dept 1996) (delay of 11 months); *Rifenburg v James*, 297 A.D.2d 901 (3<sup>rd</sup> Dept 2002) (delay of 16 months). Although courts have held that a "well-justified belief that consent was not required" might constitute a satisfactory explanation for the delay (see e.g. *DeRosa v Petrylak*, 290 A.D.2d 596 (3<sup>rd</sup> Dept 2002)), such a belief cannot be reasonable in light of a specific finding by the Workers' Compensation Board that consent is required.

In the instant case, petitioner is not entitled to *nunc pro tunc* approval of his settlement as he has failed to establish that the delay in applying for this order was not caused by his fault or neglect. Petitioner provides no satisfactory explanation for why he waited nearly 2 years after the Workers' Compensation Board closed his case - citing the lack of consent from Hereford as the reason - to bring this motion. See *Williams*, 27 A.D.3d 302. Even if, *arguendo*, petitioner originally had a well-justified belief that consent to settle his suit was not required, that belief could no longer be reasonably maintained in the face of a specific finding on the part of the Workers' Compensation Board that such consent was required. See *Wilbur*, 228 A.D.2d 928;

*Rifenburgh*, 297 A.D.2d 901. Moreover, as in *Williams*, petitioner has been vigorously pursuing workers' compensation benefits in excess of the settlement amount, making the lack of justification for the delay "particularly glaring." *Williams* 27. A.D.3d 302.

Nor can petitioner establish that the \$2,000 settlement was reasonable, for two separate and distinct reasons. First, petitioner is now seeking a finding of permanent partial disability and loss of use to his right and left legs. His vigorous pursuit of workers' compensation benefits is at odds with his argument that a \$2,000 settlement was reasonable. Petitioner blatantly states that he "suffered no permanent injuries" yet he is seeking a finding of permanent partial disability in connection with his workers' compensation claim. If indeed he has suffered a permanent disability, a \$2,000 settlement cannot be reasonable. Second, the medical records petitioner submits as proof are insufficient to establish the reasonableness of the settlement.

Since petitioner fails to establish that the settlement is reasonable and fails to establish that the delay was not due to his neglect, the court need not reach the issue of whether Hereford was prejudiced by petitioner's failure to obtain its consent. Similarly, the court need not reach the issue of whether petitioner met the procedural requirements for submitting this motion.

Accordingly, petitioner's motion for *nunc pro tunc* approval of his third-party settlement is denied and this action is dismissed. This constitutes the decision, order and judgment of the court.

**FILED**

Dated: 3/14/12

MAR 15 2012

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