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

PRESENT: HON. PAUL WOOTEN Justice PART 7

JOSEPH BRYSON AND EMANUELLA BRYSON,
Plaintiffs,

-against-

INDEX NO. 100721/06

MOTION SEQ. NO. 004

NYU HOSPITALS CENTER, RUSK INSTITUTE OF REHABILITATION MEDICINE AND GILBERT PEREZ,

Defendants.

The following papers were read on this motion by plaintiffs pursuant to Worker's Compensation Law.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

Plaintiffs Joseph Bryson and Emanuella Bryson bring this Order to Show Cause, pursuant to Workers' Compensation (WC) Law § 29(1), for an Order reducing the workers compensation lien held by Wausau Business Insurance Company (Wausau) by their *pro rata* share of litigation expenses, including attorneys fees, costs of litigation, and other legitimate expenses related to the settlement incurred in plaintiff's underlying personal injury action.[1] Wausau is an insurance carrier that paid worker's compensation insurance benefits to Bryson. In determining the apportionment of expenditures, plaintiff seeks to include $60,000.00 paid out to Gilbert Perez (Perez), a defendant in this action, to settle a separate intentional tort action

[1] For convenience, when referring to the Bryson plaintiffs the Court will use the word "plaintiff," as Emanuella Bryson's claim is derivative.

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that Perez commenced against Bryson.[2] It is this $60,000.00 payment that is the crux of the dispute between the parties in the herein motion.

The underlying personal injury case stemmed from an altercation between Bryson, a bus driver, who was picking up children with disabilities at the defendant medical facility (NYU), and Perez, an NYU security guard. The altercation resulted in Bryson and Perez each sustaining a fractured bone. After the incident, plaintiff commenced the underlying action against Perez for intentional tort, and Perez instituted a separate action against Bryson. By order, dated October 7, 2009, the two actions were consolidated, but only for discovery and trial.

Relating to the altercation incident, Bryson received workers' compensation benefits in the amount of $74,823.10. In addition, NYU settled plaintiff's underlying tort case for $250,000.00. The stipulation settling plaintiff's case in the underlying action states that the counterclaims were also settled. A separate stipulation settling Perez's case states that Bryson "agrees to pay out of his net settlement proceeds $60,000 to the plaintiff Gilbert Perez as full settlement of action #2, in accord with the CPLR, not to commence until such time as Bryson receives his proceeds in action #1" (Traub affirmation, exhibit 2 at 2).

Plaintiff states that the $60,000.00 was paid to resolve Perez's case because the bus company defendant in Perez's action against Bryson had no assets or insurance. Plaintiff asserts that without this arrangement, the case could not be settled against Perez, because once plaintiff received the settlement money from NYU, Bryson would then become the "deep pocket," as the only defendant with resources to satisfy a judgment that a jury might award to Perez against Bryson. Concerning the parties' respective claims against each other, plaintiff

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[2] The action commenced by Perez is captioned *Perez v Empire Bus Co.*, index number 403702/07.

states that the case was a "50-50 question of fact," in which the prevailing party would have received the entire recovery, "taking all" (Traub affirmation at 2).

Plaintiff states that while he received $250,000.00, the value of his injury is $500,000.00. To increase the recovery that plaintiff nets in the underlying action, plaintiff seeks a determination that, pursuant to Workers' Compensation § 29(1), the $60,000.00 paid to settle Perez's action be deemed part of the expenditures incurred in obtaining the $250,000.00 recovery, and as such that amount should be deducted from Wausau's lien. In support, plaintiff relies on Workers' Compensation § 29(1), which provides:

> "If an employee entitled to compensation . . . be injured . . . by the negligence or wrong of another not in the same employ, such injured employee . . . need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and . . . pursue his remedy against such other subject to the provisions of this chapter. . . . In such case, the . . . insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of any recovery from such other . . . 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."

This provision also permits an employee to apply to the court where a personal injury action was commenced for an order apportioning attorney's fees and necessary expenditures, as between the employee and lienor, as plaintiff did here and states that "[s]uch expenditures shall be equitably apportioned by the court between the employee . . . and the lienor" (*id.*).

Under Workers' Compensation § 29(1), an insurance carrier that has paid benefits to an injured employee is afforded a lien against the employee's recovery against a third party. However, the carrier asserting the lien must also bear a portion of the expenses incurred by the

injured employee in obtaining the recovery. This requirement helps to "stem the inequity to the claimant, arising when a carrier benefits from an employee's recovery while assuming none of the costs incurred in obtaining the recovery, and to ensure that the claimant receives a full measure of the recovery proceeds in excess of the amount of statutory benefits otherwise due the claimant" (*Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 138 [1983]). If the $60,000 that plaintiff paid to Perez is apportioned as an expenditure in obtaining Bryson's recovery, the total expenditures would increase, which, in turn, would reduce Wausau's workers' compensation lien against plaintiff's recovery. This would allow plaintiff to yield a greater recovery, while reducing the amount recovered by Wausau on its lien.

In interpreting a statute, a court looks to the statute's "plain language . . . as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I., Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568 [2004]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 92 [A], Comment ["[t]he intention of the Legislature is first to be sought from a literal reading of the act itself"], 94 ["[t]he legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction"]; *see also Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 56 [2011] [stating that "[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" [citation and quotation marks omitted]).

Plaintiff provides no case on point to demonstrate that the statute includes as reasonable or necessary expenditures incurred in effecting a recovery those funds paid by the injured employee to settle a separate action brought against the employee for his intentional tort. While there does not appear to be a case directly on point, discussion in cases reviewed

by the Court does not suggest that the permitted expenditures would include such settlement amounts (*see e.g. Kelly,* 60 NY2d at 135-136 [stating that "[u]nder [Workers' Compensation Law § 29] petitioner was deemed to be entitled to have the costs she incurred *in bringing the action*, including her attorney's fees, apportioned" and "the lien . . . is subordinate to a deduction for *costs and attorney's fees* [emphasis added]"]; *Miszko v Gress*, 4 AD3d 575, 577 [3d Dept 2004] ["an automatic lien attaches to the proceeds of any recovery, in favor of the Fund, for any amounts that the Fund has paid in compensation benefits, less litigation costs"]; *Smith v Spinoccia,*119 AD2d 660, 661 [2d Dept 1986] ["[u]nder Workers' Compensation Law § 29 (1), when an employee commences an action against a third party to recover damages for a job-related injury, the compensation carrier has a lien on the proceeds of the action, after reasonable litigation costs are deducted therefrom, to the extent of compensation previously paid to the employee"]; *see Owens v Town of Huntington*, 125 Misc 2d 574, 577 [County Ct, Suffolk 1984] ["[t]o determine which expenditures incurred in effecting the recovery were reasonable and necessary, for the purpose of apportionment, the court looked to CPLR 8301 and 8303"]).

The language of WC Law § 29(1), with its reference to equitable apportionment, suggests that a liberal, broad interpretation should be afforded an injured worker concerning the types of items that fall into the category of reasonable and necessary expenditures. However, the issue raised here is not whether or not such expenditures should be limited to the enumerated list of costs and disbursements in the CPLR, or their relatively small amounts, as raised in the briefs (*see* Traub affirmation at 5), but only whether the statute was intended to include the specific type of pay out that plaintiff made. As the statute provides for the deduction of the necessary expenditures in effecting a recovery against a third party, and explicitly states that such expenditures include attorney's fees, a reasonable inference is that the legislature intended that the provision encompass the many types of litigation expenses and costs, in

addition to attorney's fees, that are generally incurred in obtaining a recovery for the insured worker in prosecuting his or her case against a third party.

The interpretation that plaintiff requests requires a strained reading of the plain language of the statute to encompass a type of expenditure that generally would not be incurred in obtaining a recovery in an employee's personal injury action, and that was unlikely to have been within the legislature's contemplation. Nothing in the statute, or the case law to which plaintiff cites, suggests that the included expenditures would be other than those commonly thought of and generally known as necessary in prosecuting an insured employee's case to obtain a recovery. Plaintiff contends that the expenditure was necessary to relieve Bryson of the burden of possibly losing, in Perez's action, some, or all, of what plaintiff gained from the recovery from NYU in plaintiff's action. In other words, plaintiff spent the money to prevent a recovery by Perez against plaintiff, in Perez's separate tort action against plaintiff, as opposed to in effecting a recovery against NYU, or another defendant, in plaintiff's action.[3]

Plaintiff contends that the risk of ending up with nothing after trial was substantial, but such a result also would have yielded nothing for Wausau. If plaintiff wanted greater compensation he could have refused to settle, absent Wausau's agreement to compromise the lien or a greater settlement from a defendant in his case. Accordingly, under the particular circumstances of this case, the portion of plaintiff's motion seeking to reduce Wausau's lien $60,000.00, as a litigation expense under WC Law §29(1), is denied. However other than this issue, Wausau has stated no objection to plaintiff's other apportionment calculations, in amount or method.

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[3] It is unnecessary to reach the issue of whether or not paying out the money for the counterclaim(s) in the Bryson action would have been considered an offset, as plaintiff does not make this argument and the submitted stipulations do not demonstrate that this was how the settlements were structured.

CONCLUSION

In light of the foregoing, it is

ORDERED that plaintiff's motion for an Order reducing the workers compensation lien held by Wausau Business Insurance Company (Wausau) by their *pro rata* share of litigation expenses, including attorneys fees, costs of litigation, and other legitimate expenses related to the settlement incurred in plaintiff's underlying personal injury action is denied as to the $60,000.00 settlement expense, but is otherwise granted; and it is further,

ORDERED that the parties are directed to SETTLE ORDER ON NOTICE; and it is further,

ORDERED that defendant is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 7-17-14

PAUL WOOTEN J.S.C.

1. Check one: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE