

Goicoechea v Tineo

2014 NY Slip Op 33261(U)

February 21, 2014

Supreme Court, Bronx County

Docket Number: 304907-2013

Judge: Howard H. Sherman

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

-----x
ROBERT GOICOECHEA,

Plaintiff,

-against-

JOHNNY A. TINEO,

Defendants.
-----x

Index No.: 304907-2013

DECISION/ORDER

Present:

Hon. Howard H. Sherman
J.S.C.

The following papers read on this application for judicial approval of a settlement noticed on September 9, 2013 and duly submitted on the Motion Calendar of September 9, 2013.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits A - M	2	

Upon the foregoing papers this motion for approval, *nunc pro tunc*, of a settlement of his claim in a personal injury action pursuant to Workers' Compensation Law § 29(5) is denied for the reasons set forth below.

Petitioner seeks approval, *nunc pro tunc*, of the settlement of a personal injury claim pursuant to Workers' Compensation Law § 29(5).

The claim arises out of a motor vehicle accident that occurred on May 12, 2010 in the course of petitioner's employment as a bus driver for the Little Richie Bus Service, Inc.

On or about April 30, 2013 counsel for petitioner settled the third-party claim with the other driver's insurer for \$10,000.00 out of the minimum \$25,000.00 policy.

By notice dated August 19, 2013, petitioner seeks judicial approval of this settlement.

Counsel affirms that the settlement is reasonable as the insurance policy was underwritten by Allstate Insurance Company and the petitioner's injuries might not sustain a threshold challenge in light of the evidence of the 77 year old petitioner's degenerative spinal injuries. Counsel also affirms that he understood that the insurer was "taking a 50/50 position on this intersection collision."

Counsel also contends that the delay in seeking an order of approval was the result of a misunderstanding requiring clarification of the Workers' Compensation carrier's right to repayment, and the carrier was not prejudiced by the delay.

In opposition, the third-party administrator for the Workers' Compensation carrier¹ contends that the motion should be denied.

First, it is argued that the petitioner failed to name the Workers' Compensation carrier and its administrator as parties to this proceeding.

In light of the medical records and treating physician's affidavit, evidencing of continuous and ongoing medical treatment from May 2010 and an assessment of a 100% accident-related disability, it is maintained that the petitioner has failed to meet his burden to prove that the settlement is reasonable even were any potential award of damages to be diminished by a finding of the claimant's causative culpable conduct.

It is also argued that the failure to address and settle the carrier's lien, then amounting to \$12,845.23 at the time of settlement, was prejudicial to the carrier as a

¹ To date, the workers' compensation carrier has paid nearly \$63,000.00 in medical and indemnity benefits.

matter of law.

Discussion and Conclusions

Resolution of a petition for judicial approval of a settlement pursuant to Workers' Compensation Law § 29(5) is directed to the sound discretion of the court upon a consideration of the relevant factors, namely, the reasonableness of the amount of the settlement; whether the delay in applying for the approval was attributable to the employee's fault or neglect (see, Singh v Ross, 12 AD 3d 498, 785 NYS 2d 464 [2nd Dept. 2004]), and whether the insurance carrier was prejudiced by such delay (see, Matter of Wilbur v Utica Mutual Company, 228 AD 2d 928, 644 NYS 2d 435 [3rd Dept. 1996]).

Upon review of the petition as well as the papers in opposition, it is the finding of this court that the amount of the settlement for spinal and knee injuries concluded by the treating physician to constitute a permanent total disability, is, under the circumstances here, and despite issues of etiology raised by pre-existing degenerative disease and those of comparative fault arising from the underlying intersection collision, not reasonable.

There is no indication that any injuries to petitioner's left knee and right ankle as well as the lumbar spine to the extent attributable to degenerative disease were prior to the motor vehicle accident symptomatic. Nor is there any indication that prior to the accident, plaintiff had received any treatment for such pre-existing pathology.

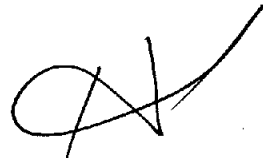
With respect to the issue of comparative fault, it is noted that the medical reports include a contemporaneous description of the collision as having been preceded by the other driver's "r[unning] a stop sign." While issues of comparative negligence

may be raised even when a driver who approaches an intersection with a stop sign (see, Nevarez v S.R.M. Mgt. Corp., 58 AD 3d 295, 867 N.Y.S. 2d 431 [1st Dept. 2008]), it is submitted that under the circumstances here described, there is no proof that the petitioner's comparative fault, if any, would greatly diminish any recovery after trial.

In light of this finding, the court makes no determination with respect to either the issues of timeliness of the application or the prejudice resulting from the failure to address the carrier's lien.

This constitutes the decision and order of this court.

Dated: February 21, 2014
Bronx, New York



Howard H. Sherman
J.S.C.