Illinois Natl. Ins. Co. v Schumann
2016 NY Slip Op 31646(U)
August 25, 2016
Supreme Court, New York County
Docket Number: 159868/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ILLINOIS NATIONAL INSURANCE COMPANY,

Plaintiff,

-against-

ROBERT SCHUMANN and SACKS & SACKS, LLP,

Defendants.

---x

Index No. 159868/14

Motion seq. no. 001, 001x

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendants move pursuant to CPLR 3211 and 3212 for an order granting them summary dismissal of the complaint against them. (NYSCEF 11). Plaintiff opposes and cross-moves for an order granting it summary judgment and, pursuant to CPLR 3126, for an order striking defendants' answer. (NYSCEF 21).

I. DEFENDANTS' MOTION

A. Undisputed facts

On or about February 19, 2011, defendant Schumann was injured in the course of his employment with plaintiff's nonparty insured. As a result of a workers' compensation claim filed by Schumann, plaintiff paid to or on his behalf, $189,103.54 in benefits, thereby obtaining a lien for that amount on any third-party recovery awarded him against anyone responsible for the injuries he sustained. Later that year, defendant Sacks & Sacks commenced an action on behalf

of Schumann against the nonparty building owner for the injury for which Schumann received the workers' compensation benefits. (NYSCEF 26).

By letter dated September 16, 2013, Mary Lee, an attorney at AIG Global Recovery Services, the insurance adjuster on the file, advised Sacks & Sacks attorney, Kenneth Sacks, that the total workers' compensation lien for the Schumann matter was $169,876.96. (NYSCEF 12).

On September 30, 2013, Lee and Sacks engaged in the following email correspondence:

> At 1:41 pm, Sacks asked Lee if plaintiff would fully waive the lien.
>
> At 2:33 pm, Lee advised Sacks with respect to a different matter.
>
> At 2:38 pm, Sacks acknowledged that Lee had referred to a different matter and asked about the status of the Schumann matter.
>
> At 3:42 pm, Lee responded as follows:
>
> > We will not waive the lien but can offer a maximum lien reduction of $64k on condition that [Schumann] funds his own MSA and satisfy [sic] his child support lien. We will be taking a full credit for your client's net recovery per NYS WC law.
>
> At 4:07 pm, Sacks offered to pay plaintiff $25,000 and to satisfy one of Lee's two conditions.

(NYSCEF 13, 31, 32). By email dated January 15, 2014, Lee advised that there was no settlement and asked that he let her know if he was interested in her prior offer, and if not, she would "provide you with a consent to settle letter with the usual 2/3's lien reduction." (*Id.*).

In or around February 2014, Sacks resolved the underlying action without plaintiff's consent for $3,500,000. (NYSCEF 17). On February 21, 2014, Sacks sent a closing statement to the Office of Court Administration reflecting that settlement, including Sacks & Sacks's receipt of a one-third contingency fee, or $1,666,666.66. (NYSCEF 16). That same day, Sacks sent a

check made out to AIG in the amount of $49,245.31, with a cover letter referencing the claim and stating that the check represented "full and final settlement of the workers' compensation lien being held" in the Schumann matter. The letter was neither addressed to Lee, or anyone else, nor was Lee or anyone else copied on it. (NYSCEF 14). On March 4, 2014, AIG cashed the check without reservation. (NYSCEF 15).

On March 13, 2014, Lee and Sacks engaged in the following email correspondence:

> At 8:31 am, Lee remonstrated that she had not settled the lien with him or with his office, and that the check was not for the correct lien amount, explaining that "[t]he statutory 2/3's is $126,069.02" and demanding the difference or an explanation of the $49,245.31.
>
> At 8:45 am, Sacks replied that Lee had offered the reduction in writing, that Schumann was totally disabled, that he had done the "msa," and that litigation was an option.
>
> At 8:52 am, Lee told Sacks that when she tried to call him at his office, she was told that he would not be in until March 18; she asked that he call her to clear up the matter.
>
> At 8:59 am, Lee reiterated that she had not authorized the $49,245.31 reduction as Sacks had claimed, explaining that the statutory lien amount owed was $126,069.02. She asked that he support his contrary assertion with the writing he had referenced, or remit the balance. Otherwise, he would leave her client no choice but to litigate.
>
> At 9:21 am, Sacks responded that he was away for the week and that he would call the following week, and that he has the letter, "plus if we litigate we [want] full waiver and we pay for msa."

(NYSCEF 32, 35).

Plaintiff thereafter commenced this action seeking a judgment in the amount of $139,858.53, representing the balance of the lien. (NYSCEF 17). In their verified answer, defendants claim that they are relieved from liability by virtue of plaintiff's accord and satisfaction. (NYSCEF 18).

B. Contentions

In support of their motion, defendants argue that as it is undisputed that they tendered a check to plaintiff with the statement that it was tendered in full and final settlement of the workers' compensation lien, and that plaintiff negotiated the check without reservation or protest, they have discharged their obligation to pay the lien. Consequently, they assert that plaintiff's claim fails as a matter of law. (NYSCEF 19).

In opposition, plaintiff maintains that defendants violated Workers' Compensation Law § 29 by paying less than half of the net amount of the lien, and that they falsely claim that it had agreed to such a large reduction of the lien. Thus, it claims entitlement to judgment in the amount of $64,000. It alleges that Sacks rejected Lee's offer to increase the reduction of the gross lien from $56,622.25 to $64,000, and counteroffered $25,000 which Lee never accepted, as confirmed in her January 2014 email whereby she again offered to reduce the gross lien by $64,000, instead of by the statutory third. (NYSCEF 22).

Plaintiff offers in support Lee's affidavit in which she denies that she advised Sacks that plaintiff consented to the settlement of the underlying action and asserts that she had determined that if plaintiff had consented to the settlement, the gross lien of $169,867.96 would be reduced pursuant to law by one-third, or $56,622.65, which represented the attorney fees to which Sacks was entitled, but that in negotiating that amount with Sacks, she agreed to reduce the lien by $64,000 instead of $56,622.65. (NYSCEF 23).

Plaintiff denies that the letter accompanying the check constitutes an accord and satisfaction, absent a highlighted endorsement on the face of the check that it constitutes a full and final settlement, and absent a bona fide dispute as to the amount owed. It also contends that

Sacks, with fraudulent intent, mailed the check without copying Lee or anyone else, in order to procure its inadvertent negotiation, and alleges that a low-level employee responsible for depositing the check could not have intentionally waived plaintiff's right to collect the balance of the lien. Plaintiff also observes that defendants never produced any evidence demonstrating that AIG or plaintiff agreed to reduce the net lien as alleged by Sacks. Plaintiff thus maintains that defendants should be estopped from relying on their defense of an accord and satisfaction, that Lee's March 13 protest should be deemed an effective protest of the amount tendered, and that it should therefore be awarded summary judgment. (NYSCEF 22).

In reply to plaintiff's opposition, defendants argue that in conceding the material facts underlying their motion, plaintiff fails to rebut their *prima facie* entitlement to summary dismissal on the affirmative defense of an accord and satisfaction. According to Sacks, a dispute arose, whereby he claimed that Lee had offered to deduct $64,000 from the net lien, meaning the lien after the deduction of one-third, whereas Lee asserted that the $64,000 was to be deducted from the gross lien. That dispute, he claims, was rendered moot when AIG negotiated the check without reservation, thereby rendering Lee's belated objection immaterial. Sacks also asserts that absent any dispute that the cover letter reflects a clear manifestation of defendants' intent that the check satisfied the lien fully, there is no triable issue of fact. He also denies having rejected plaintiff's offer when he counteroffered $25,000, and contends that in tendering the check, he had accepted her offer to reduce the lien, net of attorney fees, by $64,000. (NYSCEF 44).

In reply to defendants' opposition to its cross motion for summary judgment, plaintiff observes that defendants do not dispute its statutory entitlement to a lien on the proceeds of Schumann's recovery in the underlying action in the gross sum of the workers' compensation

benefits it paid Schumann, plus interest, less a deduction for the reasonable costs and attorney fees, yielding a net lien of $113,245.31. It also claims that there is no dispute that it never consented to settle the underlying action or to resolve the lien for $49,245.31. Plaintiff thus argues that absent any material factual issues concerning the settlement of the underlying action and of plaintiff's lien, and absent a bona fide dispute between the parties as to the amount owed by defendants, there can be no accord and satisfaction. It also observes that, in any event, the check was not made payable to plaintiff. (NYSCEF 46).

C. Applicable law

To prevail on a motion for summary judgment dismissing a cause of action, the proponent must establish, *prima facie*, its entitlement to summary judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 135 AD3d 211, 217 [1st Dept 2015]). If the moving party meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]). Here, in order to be entitled to a summary dismissal of plaintiff's case, defendants must establish that there was an accord and satisfaction between them and plaintiff.

Generally, the "acceptance of a check in full settlement of a disputed, unliquidated claim, without any reservation of rights," discharges a claimed debt. (*Nationwide Registry & Sec., Ltd. v B & R Consultants, Inc.*, 4 AD3d 298, 299–300 [1st Dept 2004]; *Trans World Grocers Inc. v*

Sultana Crackers Inc., 257 AD2d 616, 617 [2d Dept 1999]; *Complete Messenger & Trucking Corp. v Merrill Lynch Money Mkts., Inc.*, 169 AD2d 609, 610 [1st Dept 1991]). The law thereby infers from such acceptance that "the parties have made a new contract discharging all or part of their obligations under the original contract." (*Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596 [1984]; *Complete Messenger*, 169 AD2d at 610).

The successful reliance on the affirmative defense of an accord and satisfaction requires that the proponent demonstrate the existence of an actual, bona fide dispute, an "actual and substantial difference of opinion," with one party asserting the validity of his claim, and the other denying in good faith, all or part of it. (*Schuttinger v Woodruff*, 259 NY 212, 216 [1932]; *see Matter of Leckie*, 54 AD2d 205, 214 [4th Dept 1976] [where larger sum admitted due, or there was no good reason to doubt it due, release of whole upon payment of part, not to be considered as a compromise, but to be treated as without consideration and void]). While an honest belief in the correctness of one's position may suffice to establish the existence of a dispute, the dispute must be "genuine" and not a fabrication designed to evade an obligation. (19A NY Jur 2d, Compromise, Accord, and Release § 42 [2016]; *Schuttinger*, 259 NY at 216).

To establish that a dispute is genuine, the disputant must give notice before tendering a partial payment purporting to be in full satisfaction of the claim (*Trans World Grocers*, 257 AD2d at 617), and "only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim," will the claim be discharged (*Merrill Lynch*, 63 NY2d at 596).

D. Analysis

At issue here is whether defendants, in support of their defense, demonstrate, *prima facie*,

(1) that there existed an actual, genuine dispute between Lee and Sacks, manifested by a specific demand and an express, good-faith disagreement with that demand, and (2) that plaintiff was clearly informed that acceptance of the check would settle or discharge a legitimately unliquidated claim.

1. Actual dispute

It is undisputed that plaintiff is entitled by law to the gross lien, subject only to defendants' entitlement to their statutory one-third of the gross lien. And, as the law construes a counteroffer as a rejection of an offer (*Jericho Group, Ltd. v Midtown Dev. LP*, 32 AD3d 294, 299 [1st Dept 2006] ["It is a fundamental tenet of contract law that a counteroffer constitutes a rejection of an offer as a matter of law."]; 22 NY Jur 2d, Contracts § 41 [2016] ["A counteroffer constitutes a rejection of an offer, rejection by counteroffer extinguishes the offer and renders any subsequent acceptance thereof inoperative."]), no genuine dispute arose from that negotiation, nor from Lee's rejection of Sacks's counteroffer and renewed offer to reduce the maximum, or gross lien.

Defendants also fail to show that a dispute arose when defendants tendered the check, as Lee's negotiations with Sacks neither constituted a waiver of plaintiff's right to the lien, nor did it vest in defendants a right to anything greater than one-third of the gross lien, and the last email Lee sent to Sacks before he sent the check does not evidence her acceptance of $49,245.31. Rather, the emails reflect, in conjunction with defendants' failure to produce a letter that Sacks claimed evidences Lee's acceptance (*infra*, II.D.), that Sacks had no reason to believe that Lee had agreed to deduct $64,000 from the lien, net of one-third. From these emails, it may solely be inferred that Sacks sought to fabricate a dispute by sending the check. Consequently, defendants

fail to demonstrate, *prima facie*, that there was an actual, genuine disputed claim.

2. Informed acceptance

It is also reasonably inferred that Sacks, knowing that there was no settlement, intentionally dodged Lee's anticipated disagreement by sending the check to AIG without copying her or anyone else, thereby attempting to procure plaintiff's accord absent an actual, genuine dispute. Consequently and notwithstanding Sacks's cover letter, defendants are equitably estopped from claiming that plaintiff was clearly informed that acceptance of the check would settle or discharge the lien.

For all of these reasons, defendants fail to demonstrate, *prima facie*, their entitlement to summary judgment, and absent a showing of any valid defense, plaintiff is entitled to summary judgment.

II. PLAINTIFF'S CROSS MOTION

Notwithstanding plaintiff's entitlement to summary judgment (*supra*, I.D.), I address its cross motion.

A. Undisputed facts

By preliminary conference order dated February 26, 2015, the parties were directed to appear for depositions on dates certain, with plaintiff to be deposed first. Defendants were also directed to respond to plaintiff's outstanding discovery requests and demands, which per force includes a demand for a copy of the letter which Sacks had claimed evidences Lee's acceptance of $49,245.31, and a copy of the letter which he had claimed evidences Lee's agreement to settle the underlying action. (NYSCEF 37). By stipulation so-ordered on April 29, 2015, the parties were again directed to appear for depositions on dates certain, with plaintiff first; defendants

were directed to respond to plaintiff's discovery demands within 45 days. (NYSCEF 38). By order dated August 26, 2015, the parties were again directed to appear for depositions on dates certain, with plaintiff first; defendants were again directed to respond to plaintiff's discovery demands within 21 days, all with the proviso that the failure to comply may result in sanctions. (NYSCEF 39). By stipulation so-ordered on November 4, 2015, defendants alone were directed to appear for deposition and to provide, by December 18, 2015, proof that plaintiff had consented to settle the underlying action. Defendants were warned that no further extensions would be permitted without the leave of court. (NYSCEF 40).

On December 17, 2015, plaintiff agreed to Sacks's request to postpone the deposition to after the new year. On January 8, 2016, defendants filed the instant motion. By compliance order dated January 13, 2016, defendants were given a deadline of February 12, 2016 to produce the requested discovery, and February 19, 2016 for Sacks's deposition, notwithstanding defendants' pending summary judgment motion. (NYSCEF 41). Sacks failed to appear for the scheduled deposition (NYSCEF 43), and defendants have never produced the required discovery.

B. Contentions

In support of its cross motion, plaintiff alleges that defendants failed to comply with five court orders directing Sacks to appear for a deposition and to produce any alleged letter of consent relating to the underlying settlement and the lien. It thus seeks an order denying defendants summary judgment and, alternatively, an order striking defendants' answer for their failure to respond to discovery and appear for a deposition, and a default judgment in the amount of $64,000. (*Id.*).

By affidavit sworn to on March 31, 2016 and efiled on April 1, 2016, plaintiff's counsel

attests to his attempt to resolve the issues raised without the necessity of filing the cross motion by demanding that defendants respond to written discovery and that Sacks appear for a deposition. (NYSCEF 47).

By opposition dated April 1, 2016, Sacks observes that as plaintiff failed to comply with three earlier court orders to appear for deposition, the last dated August 26, 2015, his deposition could not have been held prior thereto. Sacks also seeks to excuse the failure to produce the discovery sought by plaintiff by claiming that "all parties have access to the same documents" and that there exist no documents to be produced that plaintiff does not have. (NYSCEF 46).

C. Analysis

A party who disobeys "an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, within its discretion, impose an appropriate penalty, including but not limited to, "an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, [or] from producing in evidence designated things or items of testimony . . . ." (CPLR 3126[2]; *see also Fish & Richardson, PC v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). In order to invoke "the drastic remedy of preclusion," the court must be convinced that the "offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious." (*Richards v RP Stellar Riverton, LLC*, 136 AD3d 1011, 1011 [2d Dept 2016]; *Sanchez v City of New York*, 266 AD2d 127, 127 [1st Dept 1999]). Such willful and contumacious conduct may be inferred from repeated failures to comply with discovery demands and orders without excuse. (*Henry v Datson*, 140 AD3d 1120, 1122 [2d Dept 2016]; *DeJulio v Wulf*, 260 AD2d 425, 425 [2d Dept 1999]).

Given Sacks's prior deceptive conduct (*supra*, I.D.) and subsequent failure to appear on

February 19, it is reasonably inferred that when he obtained plaintiff's agreement to put off his deposition until after the new year, he had determined to file the instant motion in order to obtain an automatic discovery stay. That stay was dissolved, however, on January 13, 2016, and defendants offer no explanation of Sacks's failure to appear on February 19, nor do they explain their ongoing failure to file a response to plaintiff's discovery demands, choosing instead to now claim that plaintiff possesses all of the evidence, including the letters allegedly embodying Lee's agreements to settle the underlying action and the lien.

From defendants's attempts to avoid Sacks's deposition and document discovery, it is reasonably inferred that Sacks's testimony would not be favorable to defendants, and that the alleged settlement letters do not and never did exist, thereby warranting the striking of the allegations set forth in defendants' answer to paragraph 11 of plaintiff's complaint.

III. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that defendants Robert Schumann's and Sacks & Sacks's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that plaintiff's cross motion for summary judgment is granted in favor of plaintiff against defendants, jointly and severally, in the amount of $64,000, with interest at the statutory rate from September 19, 2013, until the date of entry of judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

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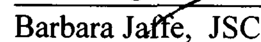

Barbara Jaffe, JSC

DATED: August 25, 2016
New York, New York