Vazquez v New York State Ins. Fund
2016 NY Slip Op 31676(U)
September 7, 2016
Supreme Court, New York County
Docket Number: 162973/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NANCY VAZQUEZ,

Petitioner,

Index No.
162973/2015

DECISION and ORDER

- against -

THE NEW YORK STATE INSURANCE FUND,

Mot. Seq. 002

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

This petition arises out of a work-related accident that occurred on November 9, 2011 at the intersection of E. 146th Street in the Bronx, New York. Petitioner Nancy Vazquez ("Petitioner" or "Vazquez") sought benefits from respondent workers' compensation carrier New York State Insurance Fund ("SIF" or "Respondent" or "Carrier") and commenced a third-party negligence action to recover damages for injuries Vazquez sustained as a result of the accident. The accident involved a motor vehicle, owned and operated by Vanessa Rodriguez-Herrera and Ashley N. Bodden (the defendants in the third-party action), which struck the vehicle in which Vazquez was a passenger.

On September 7, 2012, the Workers Compensation Board held a hearing and Workers' Compensation Law Judge Arthur J. Levy issued a notice of decision, wherein Petitioner was classified as having a temporary total disability. Judge Levy determined that the Petitioner's average weekly wage for a year prior to the date of the injury was $1073.00 and directed the Carrier to pay Petitioner at a weekly compensation rate of $715.33 from April 30, 2012 through May 21, 2012 (totaling $2,145.99). Judge Levy further ordered that "[m]edical treatment and care, as necessary, for established sites of injury and/or conditions is authorized."

Based on Judge Levy's findings, the Board proposed a stipulation of settlement of Petitioner's workers' compensation claim with a breakdown of 24.75% disability of the right arm for 77.22 weeks at a rate of $715.33, which would equal

a total lump sum payment to Petitioner in the amount of $55,237.78, less prior payments already paid and attorney's fees.

After settlement discussions in the underlying action, Petitioner agreed that the sum of $85,000.00 offered by defendants and their insurance company was a fair and reasonable settlement of the claim and sought written consent from SIF. On November 23, 2014, SIF issued a letter giving consent to settle the third-party action based on the settlement offer of $85,000.00. The letter further stated:

> [SIF] has paid $2,145.99 in workers' compensation benefits and $14,830.99 in medical benefits to and on behalf of the claimant. Of these amounts, [SIF] is claiming a lien in the sum of $145.99, representing payments made which are not in lieu of first party benefits [WCL, § 29 (1-a)]. [SIF] agrees to accept $96.81 in full satisfaction of its lien, representing the lien as reduced by [SIF's] equitable share of attorney's fees and disbursements under § 29 (1) of the [WCL]. There will be no further application for an apportionment of attorney's fees and disbursements under Section 29 (1) of the [WCL]. Burns and Stenson do not apply.
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> [SIF] reserves its rights to take credit for the claimant's net third-party recovery when computing deficiency compensation pursuant to § 29 (3, 4) of the [WCL]. Said credit will apply to any past, current and/or future workers' compensation or medical benefits to which the claimant is or may become entitled and which fall outside the scope of first party benefits, or which would cause total payments to exceed the financial limits of first party benefits. Accordingly, [SIF] will make no further payments of workers' compensation and/or medical benefits for amounts owed or to be owed which are not in lieu of first party benefits until the claimant exhausts the net third-party recovery at the compensation rate. Burns and Stenson do not apply.

Petitioner's counsel objected to certain language in the consent letter because the Carrier sought to (1) deny Petitioner's future workers' compensation rights, pursuant to *Burns v. Varriale*, 9 N.Y.3d 207 (2007), for post-settlement workers' compensation benefits; (2) require the Petitioner to waive the Carrier's obligation to periodically pay its equitable share of the future costs of litigation, including attorney's fees, incurred by Petitioner in securing such future benefits; and (3) stipulate that the case is not a deficiency case pursuant to WCL § 29(4). Petitioner's counsel requested a re-draft of the consent letter, eliminating the following provisions:

> There will be no further application for an apportionment of attorney's fees and disbursements under Section 29 (1) of the [WCL]. Burns and Stenson do not apply.

Petitioner's counsel also requested that the following language be added to the consent letter:

> The claimant preserves her rights under *Burns v. Varriale*, to petition the Workers Compensation Board to require the carrier to periodically pay its equitable share of attorney's fees and costs incurred by the claimant in securing any continuous compensate benefits.

On behalf of SIF, Daniel Becker, Esq., Acting Head of Third Party Operations, refused to alter the language in the consent letter.

On December 4, 2014, a Stipulation of Discontinuance was filed in the third-party action, *Nancy Vazquez v. Vanessa Rodriguez-Herrera and Ashley N. Bodden*, Index No. 154569/2012. On February 27, 2015, Petitioner filed a motion to resolve post-settlement issues. By a Decision and Order dated August 5, 2015, the Supreme Court, New York County, Arlene P. Bluth, J., denied Petitioner's motion as moot because it was filed after the Stipulation of Discontinuance.

Petitioner filed the instant action on December 29, 2015, seeking the following relief: (i) judicial approval of the settlement of the third-party action, *Nancy Vazquez v. Vanessa Rodriguez-Herrera and Ashley N. Bodden*, Index No. 154569/2012, pursuant to WCL § 29(1); (ii) an order preserving the Petitioner's entitlement to continued workers' compensation benefits pursuant to *Matter of Burns v. Varriale*, 9 N.Y.3d 207 (2007) despite carrier's refusal to incorporate language to that effect in its consent letter; (iii) an order preserving Respondent's obligations to periodically pay its equitable share of the future costs of litigation, including attorney's fees, incurred by Petitioner in securing such future benefits in accordance with WCL § 29; (iv) an order deeming the percentage of costs of litigation to be calculated at 33.65% for the purpose of determining Respondent's equitable share of the future costs of litigation, including attorney's fees, incurred by Petitioner in securing such future benefits in accordance with WCL § 29; and (v) an order declaring that Petitioner is owed Respondent's total equitable contribution towards the future costs of litigation during the "holiday" period.

By Decision and Order dated March 29, 2016, this Court denied the Petition without prejudice based upon Petitioner's failure to provide proof of service of the Petition upon Respondent.

Petitioner now moves for an order, granting reargument, renewal and/or reconsideration of the March 29, 2016 Order, pursuant to CPLR 2221, vacating the March 29, 2016 Order, and granting the relief requested in the Petition. Respondent does not oppose.

Petitioner submits the attorney affirmation of Dana M. Whitfield, Esq., annexing the following exhibits: (a) the affidavit of service on SIF, dated April 4, 2016; (b) Workers' Compensation Board's Notice of Decision in regard to Nancy Vazquez (WCB Case #G054 2207), dated September 12, 2012; (c) Workers' Compensation Board Stipulation; (d) SIF's letter, dated November 23, 2014, consenting to the settlement in the third-party action in the total amount of $85,000.00; (e) this Court's March 29, 2016 Order; and (f) the affidavit of service of the Petition on Respondent, dated December 29, 2015.

Petitioner argues that, in view of the evidence set forth in the Whitfield affirmation, as well as upon the submission of Petitioner's previously omitted Affidavit of Service papers attached to the instant motion and previously served upon Respondent's counsel, this Court should grant renewal, and upon reconsideration, vacate the March 29, 2016 Order and decide this matter based upon its merits, as the prior order was denied without prejudice.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)–(3).

Pursuant to CPLR 2001, "[a]t any stage of an action . . . the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just[.]"

Here, Petitioner submits the affidavit of service of the Petition attached as an exhibit to the instant motion papers. Petitioner's failure to file the proof of service was inadvertent and no prejudice is shown to the defendant. *See B.B.Y. Diamonds Corp. v. Five Star Designs, Inc.*, 6 A.D.3d 263, 264 (1st Dept. 2004) ("Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure."). Since the denial of the Petition was without prejudice and the defect has been addressed, the court will consider the Petition on the merits.

"Section 29 of the Workers Compensation Law governs the rights and obligations of employees, their dependents, and compensation carriers with respect to actions arising out of injuries caused by third-party tortfeasors." *Matter of Kelly,* 60 N.Y.2d 131, 136 (1983). A claimant may bring an action against a third-party tortfeasor and continue to receive workers' compensation benefits. WCL § 29(1). If the claimant recovers in a third-party action, the carrier is granted a lien on that recovery in an amount equal to the compensation it paid, with interest. *Id.* The lien, however, is subordinate to a deduction for costs and attorney's fees. *Id.* A claimant may move for an order equitably apportioning his counsel fees and litigation costs between him and the carrier. WCL § 29(1).

Section 29(1) provides, in pertinent part:

> Should the employee ... secure a recovery from such other, whether by judgment, settlement or otherwise, such employee ... may apply on notice to such lienor *to the court in which the third party action was instituted, or to a court of competent jurisdiction if no action was instituted*, for an order apportioning the reasonable and necessary expenditures, including attorneys' fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor.
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> WCL § 29(1) (emphasis added).

Under Workers' Compensation Law § 29(5), a petitioner may settle a third-party lawsuit arising out of the same accident as his or her workers' compensation claim without compromising his or her right to workers' compensation benefits "provided that the petitioner obtains either the carrier's prior consent to the settlement or the approval of the court in which the third-party action is or was pending, within three months after the case has been settled." *Matter of Stiffen v. CNA Ins. Cos.,* 282 A.D.2d 991, 992 (3d Dept. 2001), *lv. denied* 97 N.Y.2d 612 (3d Dept. 2002); *see Matter of Johnson v. Buffalo & Erie County Private Indus. Council,* 84 N.Y.2d 13, 19 (1994) ("Workers' Compensation Law § 29(5) requires either the carrier's consent or a compromise order from the court in which a third-party action is pending for a claimant to settle a third-party action and continue receiving compensation benefit."). "The failure to obtain either the carrier's consent or court approval will bar the petitioner from further receipt of workers' compensation benefits." *Matter of Stiffen*, 282 A.D.2d at 992; *see* WCL § 29(5).

Here, Petitioner seeks judicial approval of the settlement of the third-party action, *Nancy Vazquez v. Vanessa Rodriguez-Herrera and Ashley N. Bodden,*

Index No. 154569/2012, pursuant to WCL § 29(1), and an order preserving Petitioner's entitlement to continued workers' compensation benefits and Respondent's obligation to pay its equitable share of the future costs of litigation in securing such future benefits. Petitioner initially applied for the requested relief "to the court in which the third party action was instituted[,]" but Petitioner's motion was denied as moot because a Stipulation of Discontinuance had been filed in the third-party action following settlement. Petitioner contends that the instant Petition is made pursuant to WCL § 29(1), and therefore, only an attorney affirmation is required. Petitioner expressly states that the Petition is not made pursuant to WCL § 29(5), which would require, *inter alia*, "the affidavit of one or more physicians." Pursuant to WCL § 29(1), Petitioner may apply for an order apportioning the reasonable and necessary expenditures "to the court in which the third party action was instituted, or to a court of competent jurisdiction if no action was instituted[.]" To the extent that the instant Petition seeks to make the same arguments Petitioner made before Justice Bluth, such forum shopping must not be countenanced. The Petition is denied without prejudice to a motion to reargue before Justice Bluth.

Wherefore, it is hereby

ORDERED that Petitioner's Petition for an order pursuant to Workers' Compensation Law § 29(1) is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: SEPTEMBER 7, 2016

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EILEEN A. RAKOWER, J.S.C.