

Vazquez v Rodriguez-Herrera
2017 NY Slip Op 32188(U)
October 16, 2017
Supreme Court, New York County
Docket Number: 164569/2012
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

----- X
NANCY VAZQUEZ

Plaintiff,

-against-

**VANESSA RODRIGUEZ-HERRERA and ASHLEY
N. BODDEN,**

Defendants.
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**Index No. 164569/2012
Motion Seq: 004 & 005**

DECISION & ORDER

HON. ARLENE P. BLUTH

Motion Sequence Numbers 004 and 005 are consolidated for disposition. The motion (Mot Seq 004) to reargue is granted, and upon reargument, the motion is denied. The motion to compel disclosure (Mot Seq 005) is denied as moot.

Background

This motion arises out of this disposed motor-vehicle accident case which settled in December 2014 via a stipulation of discontinuance with prejudice (NYSCEF Doc. No. 23). Plaintiff was injured while working “on the job” and, among other injuries, underwent left shoulder surgery.

Two years before this accident case settled, the Workers’ Compensation Board (“WCB”) had found, on September 12, 2012, that plaintiff had a temporary total disability and awarded her payments for three weeks, the time period from April 30, 2012 through May 21, 2012 (NYSCEF Doc. No. 31). Almost two years *after* this car accident case settled, WCB issued another decision, filed September 15, 2016, in which it found that plaintiff had a permanent partial disability (NYSCEF Doc. No. 33).

Plaintiff brought an unopposed motion (motion sequence 003) to resolve post-settlement issues with the WCB. This Court denied that motion as moot because the accident case was disposed; that was in error. Therefore, the motion to reargue is granted and the now the Court will consider the merits of plaintiff's (now opposed) motion.

Plaintiff insists that a Court of Appeals case, *Burns v Varriale* (9 NY3d 207, 849 NYS2d 1 [2007]), requires the New York State Insurance Fund ("NYSIF") to periodically pay an equitable share of the future costs of litigation incurred by plaintiff as she attempts to collect future benefits. Plaintiff contends that NYSIF has consented to the settlement of this accident case (*i.e.* with the drivers of the car that crashed into vehicle in which plaintiff was a passenger) for \$85,000 and that NYSIF has paid \$2,149.99 in workers' compensation benefits and \$14,830.99 in medical benefits on behalf of plaintiff. Plaintiff insists that NYSIF has offered no additional compensation sufficient to relieve NYSIF of its obligation to compensate plaintiff for future costs of litigation, including attorney's fees associated with seeking workers' compensation benefits. Plaintiff requests that this Court approve the settlement of this action and compel NYSIF to pay attorney's fees going forward on plaintiff's future worker's comp earnings.

In opposition, NYSIF claims that *Burns* does not apply to future earnings and, in any event, plaintiff was not entitled to continuing compensation benefits *at the time of settlement of the accident case*. NYSIF claims that plaintiff did not receive a schedule award until almost 2 years *after* she settled this lawsuit and she had not received any kind of permanent award (nor was she entitled to continuing compensation benefits) at the time of settling this accident case because she was working. NYSIF contends that *Burns* does not permit plaintiff to come back at any time years after a case has settled to seek apportionment of fees.

Discussion

NYSIF gave its consent on November 23, 2014 for plaintiff to settle this matter for \$85,000 (*see* NYSCEF Doc. No. 32). That letter clearly states that *Burns* does not apply and that “[t]here will be no further application for an apportionment of attorney’s fees and disbursements under Section 29(1) of the Workers’ Compensation Law” (*id.*). Although plaintiff now claims that it did not agree to the language in this letter waiving plaintiff’s purported rights under *Burns*, plaintiff clearly decided to settle this case (*see* NYSCEF Doc. No. 23) after knowing NYSIF’s position. Plaintiff could have refused to settle based on NYSIF’s letter; she did not. After receiving NYSIF’s consent letter, plaintiff could have moved for declaratory relief on the basis that the inclusion of the *Burns* waiver language is impermissible; she did not. Instead, only after a settlement was reached, does plaintiff seek to require NYSIF to pay future litigation costs.

NYSIF’s consent letter could not be more clear– it states that *Burns* does not apply to its consent of plaintiff’s settlement in the instant action. Plaintiff knew NYSIF’s position in November 2014, *before* it chose to finalize the settlement in December 2014. Plaintiff cannot now seek to bind NYSIF to terms not included in its consent letter and the Court will not force NYSIF to make payments for something it expressly said it was not going pay. Had plaintiff challenged NYSIF’s insistence on plaintiff waiving her right to *Burns* payments *before* the settlement was finalized, the Court would have considered whether *Burns* and its progeny permit the inclusion of NYSIF’s waiver language.

But that motion is not before this Court. Instead, this Court’s decision is limited to the circumstances present in this case: where a plaintiff obtained a consent letter from NYSIF stating that NYSIF was not going to make ongoing litigation cost payments and that plaintiff still

decided to enter into a stipulation of discontinuance with prejudice in the accident case anyway. Further, this is a case where, at the time of the consent letter and settlement of the accident case there was no finding of partial permanent disability prior to the settlement and the plaintiff continued working after the accident (except for some time off for her surgery). Only well after (almost two years after) settlement of the accident case was plaintiff found to be permanently partially disabled. All of these factors compel this Court to deny plaintiff's motion.

The Court also recognizes that the most recent WCB decision found "that there was no settlement of the third party action (carrier had a lien, but there was never consent granted)" (NYSCEF Doc. No. 33). But plaintiff has not asked this Court to vacate the stipulation of discontinuance filed in this action— instead, plaintiff wants the Court to enforce the settlement as plaintiff desires rather than what actually occurred. In reality, plaintiff and NYSIF disagreed about the inclusion of *Burns* language, no consensus was reached and plaintiff settled the case in spite of this disagreement. The Court will not require NYSIF to follow terms it never agreed to.

Accordingly, it is hereby

ORDERED that plaintiff's motion (Mot Seq 004) for reargument is granted, and upon reargument the motion is denied; and it is further

ORDERED that NYSIF's motion (Mot Seq 005) is denied as moot.

This is the Decision and Order of the Court.

Dated: October 16, 2017
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH