

Musleh v Roger Carter, Inc.
2019 NY Slip Op 32194(U)
April 17, 2019
Supreme Court, Bronx County
Docket Number: 31133/2018E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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MANSOOR MUSLEH,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31133/2018E

ROGER CARTER, INC., ROGER CARTER and ROGER
D. CARTER,

Defendants.

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John R. Higgitt, J.

Upon the order to show cause signed March 25, 2019 and the affirmation, exhibits and memorandum of law submitted in support thereof; the April 6, 2019 affirmation in opposition of non-party The New York Black Car Operators Injury Compensation Fund Inc. ("BCF") and the exhibits submitted therewith; plaintiff's April 9, 2019 affirmation in reply and the exhibit submitted therewith; and due deliberation; plaintiff's application for a compromise order and reimbursement for the costs and attorneys' fees associated with this motion is denied with leave to renew.

Plaintiff alleges personal injuries to his neck and left shoulder caused when defendants' vehicle sideswiped his vehicle. Plaintiff has reached a settlement, in principle, with defendants and, having unsuccessfully attempted to secure consent to the settlement from BCF, his employer's Workers' Compensation insurance carrier, applies to the court under Workers' Compensation Law § 29(5) for an order approving the settlement. Plaintiff also seeks reimbursement for the costs and attorneys' fees associated with this motion because of BCF's "frivolous" refusal to consent to the settlement.

BCF opposes the application on two grounds -- lack of personal jurisdiction and plaintiff's failure to provide the information required by Workers' Compensation Law § 29(5).

BCF also opposes plaintiff's application for the imposition of costs and attorneys' fees because its withholding of consent to the settlement was not in bad faith.

Pursuant to Workers Compensation Law § 29(5), "an employee may settle a lawsuit arising out of the same incident as his or her Workers' Compensation claim for less than the amount of compensation he or she has received only if the employee has obtained written consent to the settlement from the compensation carrier, or, in the alternative, judicial approval within three months after the case has been settled" (*Matter of Jackson v City of N.Y.*, 70 AD3d 694, 695 [2d Dept 2010]; see *Ace Fire Underwriters Ins. Co. v Special Funds Conservation Comm.*, 28 NY3d 1084 [2016]; *Matter of Brisson v County of Onondaga*, 6 NY3d 273 [2006]), even if the settlement exhausts the tortfeasor's available insurance limits (see *Johnson v Buffalo & Erie County Private Indus. Council*, 84 NY2d 13 [1994]). Failure to obtain such consent or compromise order bars further payment of compensation (see *Matter of Beth V. v N.Y. State Office of Children & Family Servs.*, 22 NY3d 80, 94 n 3 [2013]; *Matter of Shiner v SUNY at Buffalo*, 144 AD3d 1371 [3rd Dept 2016], *lv den* 28 NY3d 916 [2017]), and results in forfeiture of "any further benefits for which a recovery might have been had in the third-party action" (*Matter of Rodriguez v New Sans Souci, N.H.*, 98 AD3d 1205, 1205 [3rd Dept 2012], *lv den* 20 NY3d 856 [2013] [citation omitted]).

"[I]t is not a prerequisite for judicial approval that a party first seek, but fail to obtain, the carrier's consent" to settlement (*Matter of Lautenschuetz v AP Greene Indus., Inc.*, 48 AD3d 948, 950 [3rd Dept 2008]; see also *Taylor v Continental Ins. Co.*, 9 AD3d 657 [3rd Dept 2004]; *Kusiak v Commercial Union Assurance Cos.*, 49 AD2d 122 [4th Dept 1975]). A carrier is under no legal obligation to respond to a claimant's request for approval of a settlement or to consent to the settlement (see *Bernton v Utica Mut. Ins. Co.*, 279 AD2d 728 [3rd Dept 2001]).

“Resolution of a petition for judicial approval of a settlement is committed to the sound discretion of the Supreme Court” (*Matter of Empire State Transp. Workers’ Comp. Tr. v Special Funds Conservation Comm.*, 163 AD3d 558 [2d Dept 2018]). “The court must determine whether the carrier was prejudiced by the settlement [], which depends on whether the settlement [] was ‘reasonable’” (*Mueller v Elliott*, 139 AD3d 1341, 1342 [4th Dept 2016]). The carrier must be given an opportunity to be heard (*see Daly v Michael Daly Constr. Corp.*, 136 AD2d 798 [3rd Dept 1988], *lv den* 72 NY2d 807 [1988]; *Feller v Sano-Rubin Constr. Co.*, 62 AD2d 1071 [3rd Dept 1978]), and adequate consideration must be given to the carrier’s objections, if any (*see Davison v Chemical Leaman Tank Lines, Inc.*, 136 AD2d 937 [4th Dept 1988]).

The terms of the settlement must be reasonable under the attendant circumstances (*see Buchanan v Scoville*, 241 AD2d 965 [4th Dept 1997]; *Dauenhauer v Continental Cas. Ins. Co.*, 217 AD2d 943 [4th Dept 1995]). Reasonableness may be informed by the nature and extent of the claimed injuries (*see Gregory v Aetna Ins. Co.*, 231 AD2d 906 [4th Dept 1996]), the amount obtainable from the tortfeasor (*see Anzalone v Traveler’s Ins. Co.*, 150 AD2d 567 [2d Dept 1989]), the unlikelihood of recovery from an additional or alternative source (*see Manning v Peerless Ins. Co.*, 265 AD2d 900 [4th Dept 1999]), the strength (or lack thereof) of the worker’s claim against the alleged tortfeasor (*see Neblett v Davis*, 260 AD2d 559 [2d Dept 1999]; *Kacprowski v Sorro*, 117 AD2d 585 [2d Dept 1986]), the proportion of the proceeds coming to claimant (*see Kusiak, supra*), and the exhaustion of available insurance policies (*see Merrill v Moultrie*, 166 AD2d 392 [1st Dept 1990], *lv den* 77 NY2d 804 [1991]; *Miszko v Gress*, 191 Misc 2d 229 [Sup Ct, Ulster County 2002]). The court’s order does not resolve issues that may be pending before the Workers’ Compensation Board, but merely determines whether the proposed settlement is reasonable and should be judicially approved (*see Nachison v Phoenix of Hartford*

Ins. Co., 30 AD2d 499 [3rd Dept 1968]).

Various content requirements contained in Workers' Compensation Law § 29(5) assist the court in determining whether a settlement is reasonable (*see Macey v Uninsured Employers' Fund*, 80 AD2d 951 [3rd Dept 1981]). The application must contain a petition, an attorney's affidavit and a physician's affidavit (*see Workers' Compensation Law* § 29[5]).¹ In addition to the documentation required by Workers' Compensation Law § 29(5), 22 NYCRR § 202.66(a) requires that the applicant submit a proposed order.

While "a liberal standard is applied in determining whether a settlement is reasonable" (*Matter of Snyder v CNA Ins. Cos.*, 306 AD2d 677, 678 [3rd Dept 2003]), the application must contain sufficient factual and legal support to permit the court to make a reasoned and thoughtful

¹ Pursuant to Workers' Compensation Law § 29(5),

"The petition shall contain the following:

- a. The name and residence of the petitioner if the employee, or petitioner's relationship to the deceased;
- b. The date of accident and a general description thereof;
- c. The nature and extent of the damages sustained, including the name of the physician or physicians attending or consulting in the treatment and the medical expenses incurred, the period of disability resulting from the accident, the total amount of wages lost thereby, and the present physical condition;
- d. The terms of the attorney's retainer and of the proposed settlement and petitioner's approval thereof; and
- e. Whether any previous application for the settlement of the claim has been made, and if so, the time and the court or justice thereof and the disposition made of same.

The affidavit of the attorney shall set forth by whom, on what date and under what terms he was retained, the services rendered by him, his fee if the settlement is approved, the acts complained of, the terms of the proposed settlement with a statement of his reasons for recommending the same, and shall state that he has not become concerned in the application or its subject matter at the instance of such defendant directly or indirectly and that he has not received and is not to receive any compensation from such defendant directly or indirectly.

The affidavit of the physician in a claim arising from personal injury to the employee, shall set forth his connection with the case; the period covered by the treatment and the nature, duration and extent of the injuries; the date of his last examination and the condition of the employee at that time; whether or not the employee is still suffering any disability or inconvenience as the result of the injury, giving the details thereof; whether or not the accident has left the employee with any permanent disability, defect, scar or impairment; the cost of the treatment and whether or not he expects to be paid or has been paid by the defendant or by anyone acting on the defendant's behalf. Where the affidavit as to the present condition is not made by the attending physician, the latter's affidavit setting forth the character of the injuries and treatment should also be attached, or the failure to obtain it explained. Where the employee was confined to a hospital, the court may require the production of hospital records."

assessment of the reasonableness of the proposed settlement (*see Matter of Carlone v Utica Mut. Assurance Co.*, 158 AD3d 755 [2d Dept 2018]). The application must “satisfactorily” comport with the content requirements (*see Manning*, 265 AD2d at 901), and technical infirmities may be disregarded (*see Dauenhauer, supra; Merrill, supra*). Not all omissions need result in denial of the application, so long as the court is presented with sufficient information from which to discern reasonableness (*see Mueller, supra; Neblett, supra*). “[T]he Workers’ Compensation Law should be liberally construed in favor of the employee and an overly legalistic approach thereto should be avoided” (*Spurling v Beach*, 93 AD2d 306, 309-10 [3rd Dept 1983], *lv den* 64 NY2d 605 [1985] [affirming order approving settlement where application contained “most” of the required information and other information, while not explicitly stated, could be reasonably “implied” from context]).

Turning to BCF’s arguments in opposition to plaintiff’s application, BCF asserts that because it was not a party to this action, plaintiff did not commence an action or special proceeding against it, and plaintiff did not serve any papers upon it in a manner sufficient to confer personal jurisdiction pursuant to the Civil Practice Law and Rules, the application must be denied.

Workers’ Compensation Law § 29(5) states, in pertinent part, that

A copy of the papers to be used on the application to compromise and settle the claim must be served as directed by the court or in the same manner as provided in the civil practice law and rules for a notice of motion upon the commissioners of the state insurance fund or such officer thereof designated by them or upon the person, association, corporation, or insurance carrier, whose written approval would have been required to compromise such cause of action by the employee or his dependents. *This notice shall afford them the opportunity to submit affidavits and to be heard by the court on the application* (emphasis added).

“When judicial approval of a compromise settlement is sought, the petitioner is required to serve a copy of the application papers upon the party whose written approval would have

otherwise been required, to afford it the opportunity to submit affidavits and be heard upon the application in order to protect its right of subrogation” (*Baiano v Squires*, 113 AD2d 732, 734 [2d Dept 1985]; *see also Schnabel v Grimes*, 31 AD2d 375 [2d Dept 1969]). The instruction in Workers’ Compensation Law § 29(5) to serve the papers “as directed by the court” “implicitly requires the use of a show cause order” (*Lo Cascio v Lo Cascio*, 101 Misc 2d 679, 681 [Sup Ct, Queens County 1979]), as plaintiff employed here. The order to show cause directed plaintiff to serve the papers upon BCF by overnight mail to its counsel, on or before March 28, 2019. Plaintiff’s affidavit of service states that such service was performed on March 26, 2019. Plaintiff having served the application in accordance with the court’s order, the court may entertain the application (*cf. Crown Waterproofing, Inc. v Tadco Constr. Corp.*, 99 AD3d 964 [2d Dept 2012]).

Although plaintiff served the application in the manner directed by the order to show cause, such service would ordinarily not be sufficient to establish jurisdiction over BCF in a plenary civil action (*see Dollinger v Alsen*, 20 Misc 3d 1125[A], 2008 NY Slip Op 51619[U] [Sup Ct, Suffolk County 2008]). Nevertheless, “[r]egarding the court’s exercise of personal jurisdiction over [BCF], three essential requirements must be met, to wit: notice, opportunity to be heard and a basis for the exercise thereof” (*Spurling*, 93 AD2d at 308). Such requirements have been satisfied here.

Furthermore, “[BCF] may be made a party to a special proceeding for the type of relief sought herein, the petition for which may be brought on, as it was here, by Order to Show Cause. In this instance, petitioner’s failure to appropriately purchase a new index number ... is a non-prejudicial oversight which the court may permit to be corrected” (*Kilroy v A.C. & S. Inc.*, 2011 NY Slip Op 33501[U], at *4 [Sup Ct, N.Y. County 2011], *affd sub nom Humphries v*

Consolidated Edison Co. of NY Inc., 106 AD3d 634 [1st Dept 2013] [citations omitted]). The timely filing of initiating papers within the context of a related disposed action may be disregarded as a procedural irregularity, in the absence of prejudice (*see* CPLR 2001; *MacLeod v County of Nassau*, 75 AD3d 57 [2d Dept 2010]). “[T]he key question is whether, if the correction of the mistake is permitted, or the mistake is disregarded, a substantial right of the defendant or respondent would be prejudiced” (*MacLeod*, 75 AD3d at 63). BCF has received appropriate, timely notice of the application, has responded fully to the application, has not claimed or demonstrated prejudice arising from plaintiff’s service of the papers by overnight mail, and has not cross-moved for dismissal of the petition or other relief on that ground. The court thus finds that it is not prevented from deciding the application on its merits because of the various procedural technical infirmities.

BCF next asserts that the application does not meet the requirements of Workers’ Compensation Law § 29(5) with respect to medical proof. Specifically, BCF asserts that plaintiff has failed to submit a physician’s affidavit or other competent medical proof permitting an assessment of plaintiff’s current condition and prognosis, so as to properly assess the propriety of the settlement amount. BCF argues that without appropriate evidence as to the potential for future damages – or, more appropriately, the lack thereof – the court cannot assess whether the settlement is appropriate under all circumstances.

The accident occurred on September 6, 2018 at 12:30 a.m. Plaintiff was approximately 31 years old at that time. Plaintiff submits his complete medical record, which consists of: (1) the report from the September 19, 2018 MRI of plaintiff’s left shoulder, showing a six-millimeter interstitial tear at the distal insertion of the supraspinatus tendon, trace fluid in the joint, hypertrophic changes to the acromioclavicular joint, and a down-sloping acromion approaching

the bursal surface of the rotator cuff; (2) the report from the September 19, 2018 MRI of plaintiff's cervical spine, showing a bulge and two herniations without significant protrusion into the neural canal, recesses or foramina, with disc hydration loss; (3) the report from the September 25, 2018 X ray of plaintiff's thoracic spine, showing a normal study; (4) the affirmed report from plaintiff's September 17, 2018 initial psychiatric evaluation indicating reductions in cervical and shoulder ranges of motion, but negative provocative testing results and normal neurological testing; (5) physical therapy records for seven sessions from September 27, 2018 to October 26, 2018; and (6) a bill from the physical therapy facility for a total of eight sessions from September 27, 2018 to November 2, 2018.

Plaintiff averred that that he has received no treatment other than the eight physical therapy sessions; he lost nine days from work, for which he received payment from BCF in the amount of \$400.00; the medical imaging cost \$2,700.00 and the treatment cost \$643.10, for a total of \$3,343.10; he has worked since the accident and is able to do so; and "there does not, at least as of the present, appear to be any further medical [*sic*] or indemnity required."

The physical therapy records are not particularly useful for any purpose beyond establishing that plaintiff received and tolerated treatment; thus, plaintiff provides no narrative medical assessment of his condition at any time after the initial assessment, which occurred 11 days after the accident. While this medical evidence may be instructive on the issue of whether plaintiff sustained a "serious injury," as defined in Insurance Law § 5102(d), as a result of the accident, and thus the viability of the personal injury action against defendants, the evidence submitted does not sufficiently set forth "the date of [plaintiff's] last examination and the condition of the employee at that time; whether or not the employee is still suffering any disability or inconvenience as the result of the injury, giving the details thereof; whether or not

the accident has left the employee with any permanent disability, defect, scar or impairment” and plaintiff’s “present condition” (Workers’ Compensation Law § 29[5]).

Prior to the 1966 amendment of Worker’s Compensation Law § 29(5), a plaintiff was required to obtain the carrier’s consent to a settlement with a tortfeasor, and did not have the option of resorting to judicial compromise. The “sole purpose” of the pre-1966 iteration of Workers’ Compensation Law § 29(5) was “to prevent imprudent settlements of such suits by the employee or his [or her] estate to the prejudice of the employer’s (or carrier’s) subrogated rights” (*Meachem v N.Y. Cent. R. Co.*, 8 NY2d 293, 297 [1960]). The 1966 amendment “intended to offer a method whereby the plaintiff may settle his [or her] action without consent of the insurer and still retain his [or her] right to further compensation ... In addition, the insurer is afforded further protection by notice of the proposed settlement and the opportunity of pointing out to the court the possible inadequacy of the settlement” (*Nachison*, 30 AD2d at 502, *citing* Seventh Annual Report of N. Y. Judicial Conference, 1962, p. 16). One of the court’s functions on a compromise application remains consideration of the carrier’s potential exposure if the settlement is disproportionate to the compensation coverage.

A plaintiff’s failure to submit a formal affidavit of a medical professional is not necessarily fatal to his or her Workers’ Compensation Law § 29(5) application (*see Moore v Rockland Kosher Supermarket*, 34 Misc 3d 1210[A], 2012 NY Slip Op 50031[U] [Sup Ct, Kings County 2012]), if the medical records submitted are adequate to allow the court to fully assess the reasonableness of the settlement, given the factors enumerated in Workers’ Compensation Law § 29(5) (*cf. Kouadio v Hereford Ins. Co.*, 2012 NY Slip Op 30632[U] [Sup Ct, N.Y. County 2012]). Where the medical records and other proof provide “most” of the required medical and treatment information (*see Neblett, supra*), the court need not exalt form -- the formal statutory

requirements -- over substance (*see Mueller, supra; Amacio v State of N.Y.*, 130 AD3d 549 [1st Dept 2015]).

Here, BCF correctly observes that plaintiff's application does not contain evidence of plaintiff's prognosis, the need (if any) for future treatment, and the duration and extent of his disability (*see Jin Yu Liu v Hermitage Ins. Co.*, 2017 NY Slip Op 31320[U] [Sup Ct, N.Y. County 2017]).² The court therefore finds that plaintiff's affidavit was not sufficiently detailed to permit an assessment of these factors for purposes of determining the reasonableness of the settlement. For example, plaintiff did not state why he stopped treating, his condition when he stopped treating, or his present condition, apart from his ability to work.

Finally, plaintiff seeks an award of the costs and attorneys' fees associated with the making of this motion, because of BCF's purportedly unreasonable refusal to consent to the settlement. Fees are not recoverable as against the movant's insurer, unless the insured "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). The *Mighty Midgets* rule is founded on the scope of the insurer's duty toward the insured (*see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592 [2004]). BCF is not plaintiff's insurer. Furthermore, as stated above, an insurer has no legal obligation to consent to a settlement (*see Bernthon, supra*).

To the extent the motion is premised upon BCF's "frivolous" refusal to consent to the settlement, sanctions are available for frivolous conduct that is completely without merit or undertaken primarily to delay or harass (*see 22 NYCRR § 130-1.1[c]*). Taking a position completely lacking in legal merit need not result in sanctions where the conduct is not

² The court notes that *Jin Yu Liu* involved assessing the reasonableness of a \$25,000.00 settlement where plaintiff's injuries required, among other things, a craniotomy.

sufficiently egregious (*see Carson v Hutch Metro Ctr., LLC*, 110 AD3d 468 [1st Dept 2013]).

The court finds that BCF's conduct, while frustrating to plaintiff, does not constitute "frivolous" conduct (*see Smartix Intl. Corp. v MasterCard Intl. LLC*, 90 AD3d 469 [1st Dept 2011]; *Levy v P&R Dental Strategies, Inc.*, 302 AD2d 255 [1st Dept 2003], *lv den* 1 NY3d 501 [2003]). In light of the absence of medical documentation permitting an assessment of the extent and duration of plaintiff's entitlement to future benefits (if any), the court cannot say that BCF's failure to consent to the settlement was "arbitrary" (*see Fidelity & Guar. Ins. Co. v DiGiacomo*, 125 AD3d 596, 598 [2d Dept 2015], *lv den* 25 NY3d 907 [2015]).

Accordingly, it is

ORDERED, that the aspect of plaintiff's application for a compromise order is denied with leave to renew upon an application containing an affidavit as to plaintiff's prognosis, need for future treatment, and the duration and extent of his disability, to be submitted within 60 days after service of a copy of this decision and or with written notice of its entry; and it is further

ORDERED, that the aspect of plaintiff's application for reimbursement for the costs and attorneys' fees associated with this motion is denied.

This constitutes the decision and order of the court.

Dated: April 17, 2019



John R. Higgitt, A.J.S.C.