SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA **PART** IAS MOTION 22

Justice

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JOSEPH DENARDO,

Plaintiff,

- v -

9139-8834 QUEBEC INC. INDIVIDUALLY AND DOING BUSINESS AS TRANSPORT HM, MADELINE MARIEN, TRANSPORT HM,

Defendant.

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INDEX NO. 155894/2016

MOTION DATE 11/27/2019

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for MISCELLANEOUS.

Before the Court is plaintiff's Order to Show Cause to issue a nunc pro tunc compromise order to approve the settlement of plaintiff's case against defendants in the agreed amount of $2,800,000 and vacating the worker's compensation lien asserted by Helmsman Management Services, Inc. for Hampshire Insurance Company (hereinafter the "Carrier"), to the extent that it is claimed to exceed the "final lien amount" of $515,380.80, and further reduced by $50,000.00 in accordance with applicable New York Insurance Law and Workers Compensation Law.

Background

This matter stems from a motor vehicle accident which occurred on November 10, 2015, while plaintiff was driving on the southbound Hutchinson River Parkway when his vehicle attempted to avoid debris from defendants' vehicle after it crashed into an overpass at Westchester Avenue. To date the Carrier avers to having provided a total of $580,324.93 in Workers' Compensation benefits on the instant claim (Aff in Opp, Exh A).

A private mediation was held on October 25, 2019, before retired Justice Allen Hurkin-Torres, during which a settlement offer was made on behalf of all defendants in the amount of two million eight hundred thousand dollars ($2,800,000.00) (Mot, Exh C). Prior to the mediation, a lien amount concerning plaintiff's Worker's Compensation benefits was obtained from the Carrier. The plaintiff was advised by letter that the workers compensation claim had been closed and that the final lien amount was $515,380.80 (Mot, Exh E). Said letter was dated February 27, 2018, a year and eight months before the parties met for mediation and settlement on October 25, 2019.

Plaintiff avers that after receipt of the letter they were contacted via e-mail that the lien amount was $580,324.17 (Mot, Exh G). To date plaintiff has not received consent to settle the case and claims that the "final lien amount" of $515,380.80 was an important factor in accepting the $2,800,000.00 settlement offer. Plaintiff argues that because the lien was specifically identified as a "final lien amount" that plaintiff relied upon the accuracy of the amount ($515,380.80) communicated in the letter.

Relief Sought

Here, plaintiff requests that Liberty Mutual Insurance Company be equitably estopped from changing the lien amount of $515,380.80 to $580,324.17. Plaintiff also requests that the lien is reduced by $50,000 in accordance with applicable New York Insurance Law and Workers Compensation Law. Plaintiff argues that the final settlement should not be reduced by Liberty Mutual's worker's compensation policy that otherwise would have been payable by plaintiff's no-fault carrier pursuant to Insurance Law 5104.

Equitable Estoppel

In support of his argument that Liberty Mutual Insurance Company should be equitably estopped, plaintiff relies on *Santa v Capitol Specialty Insurance, Ltd.*, 96 AD3d 638 [1st Dept 2012] in which an insurer was equitably estopped from arguing that a declaratory judgment action was limited to primary policy, where plaintiffs had detrimentally relied upon the insurer's failure to raise the argument and were otherwise unaware of a dispute regarding excess coverage.

A party seeking to assert equitable estoppel must demonstrate: "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position". (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850 [1st Dept 1985] citing *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [4th Dept 1980]). In opposition the Carrier argues that plaintiff has not met the requisite elements necessary to benefit from equitable estoppel. The Carrier argues that plaintiff did not rely on the "final lien amount" letter to his detriment. The Carrier points to the lack of an affidavit from plaintiff or any other evidence to support its argument that plaintiff relied on the letter. The Carrier attaches an October 18, 2019 letter from plaintiff's counsel to Liberty Mutual Insurance Company in which plaintiff requested the carrier to "provide my office with a final lien amount along with written consent to settle the third-party case" (Mot, Exh F).

The Carrier convincingly argues that had plaintiff been so certain about the "final lien amount" based on the letter previously received by plaintiff 19 months prior he would have negotiated a settlement based on that amount and would not have requested a final lien amount at the time of settlement. The Carrier further notes that the February 27, 2018 letter makes no mention of whether the amount provided was a gross lien amount or an enforceable lien amount reached after deducting the Carrier's statutory obligation to contribute towards attorney's fees

and disbursements (Mot, Exh E). Plaintiff has failed to demonstrate that he changed his position in reliance on the lien amount and to his detriment. Plaintiff has failed to submit evidence to support his claim of detrimental reliance and mistakenly relies on the Court's ruling in *Santa*. The plaintiff in *Santa* was told that there was more coverage than there was and relied on this misinformation. The *Santa* plaintiff failed to exercise their option to settle their claims for the amount that was available on the claim, which had eroded by the time the claimant discovered the correct amount of coverage. Here, plaintiff's case is not analogous to the plaintiff in *Santa* and plaintiff herein has failed to demonstrate a detrimental reliance.

Insurance Law 5104

Plaintiff requests that the Court adjust the lien amount by $50,000.00 in accordance with applicable New York Insurance Law and Workers Compensation Law. In support of his argument plaintiff relies on Insurance Law 5104[a] and [c]. "A seriously injured automobile accident victim is allowed to plead for basic economic loss recovery as well as for noneconomic loss in a direct action, but the final judgment must be reduced by the court by the amount of basic economic loss, for which recovery in the direct action forum is forbidden" (*Dietrick v Kemper Ins. Co.*, 76 NY2d 248 [1990] citing Insurance Law § 5104 [a], [c]).

Insurance Law § 5104 [a], provides:

> (a) Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or basic economic loss.

Plaintiff argues that an insured is a "covered person" for purposes of No-Fault, if it is insured by a company authorized to do business in New York with limits of at least the statutory minimum. Thus, plaintiff argues that Liberty Mutual's "final lien amount" of $515,380.80 should be reduced not only by their proportionate share of plaintiff's attorneys' fees and disbursements

but also by $50,000.00 as provided under No-Fault. Plaintiff relies on the Court's ruling in on *Hunter v OOIDA Risk Retention Group, Inc.*, 909 NYS2d 88 [2d Dept 2010], which stated that:

> "Vehicle and Traffic Law § 311 provides, in relevant part, that 'proof of financial security' consists of an 'owner's policy of liability insurance,' which (1) affords minimum coverage to any one person in the sum of $25,000 where injury is sustained, and the sum of $50,000 where death results, and coverage to two or more people in the sum of $50,000 for injury, and $100,000 for death; and (2) in the case of a vehicle registered in another state, is either issued by an insurer authorized to issue policies in New York, or by an unauthorized insurer who has, among other things, filed a statement with the New York State Commissioner of Motor Vehicles consenting to service of process and indicating that its policies may be deemed to be varied so as to comply with the requirements of Vehicle and Traffic Law article six (Vehicle and Traffic Law § 311[3], 311[4][a], 311[4][c]; see 11 NYCRR 60–1.1)."

In opposition the Carrier successfully argues that the defendants are not a covered party and therefore Insurance Law § 5104 [b] applies. N.Y. Insurance Law § 5104 [b] provides:

> (b) In any action by or on behalf of a covered person, against a non-covered person, where damages for personal injuries arising out of the use or operation of a motor vehicle or a motorcycle may be recovered, an insurer which paid or is liable for first party benefits on account of such injuries has a lien against any recovery to the extent of benefits paid or payable by it to the covered person.

The Carrier successfully demonstrates that here, the insurer provided benefits to plaintiff who obtained a third-party recovery from defendants who are a "non-covered person", thus the Carrier may include benefits paid in lieu of No-Fault in its lien against the third-party recovery. The Carrier notes that N.Y. Insurance Law § 5102 (j) defines a "covered person" as:

> Any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by article six or eight of the vehicle and traffic law or which is referred to in subdivision two of section three hundred twenty-one of such law; or any other person entitled to first party benefits.

Proof of financial security is defined by the Vehicle and Traffic Law (VTL) § 311(3) as "proof of ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance." VTL § 311(4)

sets forth the requirements for "owner's policy of liability insurance" specifically regarding out-of-state vehicles. VTL § 311(4)(c) states that:

> (b) In the case of a vehicle lawfully registered in another state, or in both this state and another state, either a policy issued by an authorized insurer, or a policy issued by an unauthorized insurer authorized to transact business in another state if such unauthorized insurer files with the commissioner in form to be approved by him a statement consenting to service of process and declaring its policies shall be deemed to be varied to comply with the requirements of this article.

The Carrier successfully established that for an out-of-state vehicle to qualify as a "covered person", a vehicle must be insured by either a policy issued by an authorized insurer, or a policy issued by an unauthorized insurer which has filed with the commissioner and been authorized to do business in another state pursuant to Article 6 of the VTL. Here, the Carrier demonstrates that defendants' vehicle was registered in Quebec, Canada to defendant 9139-8834 Quebec Inc. which is an out-of-country insurance policy with Intact Insurance Company. The carrier avers that Intact Insurance Company has not filed a statement with the New York State Commissioner of Motor Vehicles.

The Carrier conducted a search on the New York Department of Motor Vehicles database and the New York State Department of Financial Services. The Carrier provides e-mail correspondence with the New York State Department of Motor Vehicles in which the DMV advised that it does not have a Resolution and Power of Attorney on file for Intact Insurance Company (Aff in Opp, Exh C.) Further, Intact Insurance Company is not listed on the databases and thus the Carrier has demonstrated that Intact Insurance Company is not authorized to do business in New York (Aff in Opp, Exh B).

The Carrier notes that plaintiff's argument that the Carrier is not entitled to assert a lien for first party benefits against the third-party settlement relies on *Hunter*. In *Hunter*, the insurer of the defendant was USAA Insurance company, which wrote policies both out of state and in

New York. The defendant driver was a covered person because the insurer USAA met the minimum requirements of the VTL. Here, plaintiff has provided no evidence that Intact Insurance Company meets the VTL requirements. The Carrier's opposition has made clear that the case at bar involves an out-of-state insurer which is not authorized to write insurance policies in New York and that the Carrier is entitled to include the first $50,000.00 in benefits paid in lieu of No-Fault in its lien against plaintiff's third party settlement recovery. Thus, plaintiff has failed to demonstrate that the final lien amount should be further reduced by $50,000.00 such that his order to show cause is denied.

Accordingly, it is

ORDERED that the branch of plaintiff's order to show cause to vacate the worker's compensation lien asserted by Liberty Mutual Insurance Company, to the extent that it is claimed to exceed the amount of $515,380.80 is denied; and it is further

ORDERED that the branch of plaintiff's order to show cause to reduce the lien against plaintiff's third-party settlement recovery is denied; and it is further

ORDERED that the final lien amount, after the deduction of the Carrier's statutory obligation to reduce its lien per its obligation to contribute toward plaintiff's attorney's fee and costs/disbursements (33.71%), the Carrier has an enforceable lien in the amount of $384,697.40.

This Constitutes the Decision/Order of the Court.

2/20/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE