# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

***Justice***

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NEW HAMPSHIRE INSURANCE COMPANY
and VERIZON NEW YORK INC.

Plaintiffs,

- v -

KRENTSEL & GUZMAN, LLP and BRIAN SHARKEY,

Defendants.

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**INDEX NO.** 657213/2017

**MOTION DATE** 2/19/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover $43,247.75 in workers compensation benefits paid to defendant Brian Sharkey, the plaintiffs, New Hampshire Insurance Company, the insurer, and Verizon New York Inc, the insured employer of Sharkey, move for summary judgment pursuant to CPLR 3212. The defendants oppose the motion and cross-move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). The motion is granted and the cross-motion is denied.

In 2013, defendant Brian Sharkey suffered personal injuries while working for Verizon, apparently by being attacked by a dog. Sharkey commenced a third-party personal injury action against Animal Care and Control of New York City in the Supreme Court, Kings County, pursuant to Workers' Compensation Law §29(1). In June 2016, that action resulted in a settlement of $175,000. After expenses and legal fees paid to defendant Krentsel & Guzman LLP, his counsel, Sharkey received $73,322.33. In the meantime, Sharkey had applied for and received workers compensation benefits in excess of $40,0000. By a letter dated August 10, 2015, the plaintiffs informed Sharkey and his counsel, defendant Krentsel & Guzman LLP, of the workers compensation lien. Upon learning of the settlement, the plaintiffs demanded payment on the lien, and the defendants have refused to pay. This action, and motions, ensued.

It is well settled that the proponent of a motion for summary judgment is entitled to that relief upon a prima facie showing, by proof in admissible form, that there are no triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Where an employee brings a third-party action pursuant to Workers Compensation Law § 29(1), and recovers proceeds, the carrier is granted a lien on the proceeds for the amount it has paid out, plus interest. See Kelly v State Ins. Fund, 60 NY2d 131 (1983); Ronkese v Tilcon New York, Inc., 129 AD3d 1273 (3rd Dept. 2015); Mayerhofer v Turner Constr. Co., 29 AD3d 320 (1st Dept. 2006). Moreover, the employee's counsel may be held liable where it held the settlement funds. See Commissioner of State Ins. Fund v Schell, 23 AD2d 556 (1st Dept. 1965); Commissioner of State Ins. Fund v Crown, 65 Misc 2d 593 (App Term, 1st Dept. 1970); State Ins. Fund v Parrilla, 31 Misc 2d 835 (Mun Ct, NY County 1961).

In support of their motion, the plaintiffs submit the pleadings, an affirmation of counsel, and an affidavit of Christopher Martin, a Recovery Claims Examiner for Sedgwick, Inc, third-party administrator for the plaintiffs, who states that Sedgewick sent the letter to the defendants informing them of the lien on August 10, 2015. The letter is appended as an exhibit, as are email exchanges between a former associate of the defendant law firm and Martin's office. Martin alleges that his office later learned, in October 2017, that the matter had settled, after which they emailed defendant Krentsel & Guzman LLP requesting to be reimbursed, to no avail. The plaintiffs also submit a payment history reflecting payments made to or on behalf of defendant Sharkey, in the sum of $41,499.54.

In opposition and in support of their cross-motion, the defendants rely largely upon the affirmation of Marcia Raicus, an associate of the defendant law firm. She does not allege that she has any personal knowledge of the facts, and does not deny receipt of the notice, but merely makes legal arguments. There is no affidavit from defendant Sharkey.

The defendants do not argue that the Workers Compensation Law § 29(1) is inapplicable here. Rather, the gravamen of their opposition and cross-motion is that they were not on notice of the plaintiffs' lien prior to the settlement. However, the statute makes no mention of any notice requirement. See Lumberman's Mutual Casualty Co. v United Traction Co., 59 Misc 2d 1096 (Sup Ct, Albany County 1969); Comm. of State Ins. Fund v Garcia, 49 Misc 3d 875 (Sup Ct, Suffolk County 2015); Comm. of State Ins. Fund v Sims, 187 Misc 85 3d 875 (Sup Ct, Albany County 1946). Nor do the defendants provide any decisional authority in that regard. In any event, neither defendant here can reasonably argue that they were unaware of this lien. Defendant Sharkey does not, by affidavit or otherwise, dispute that he received the monies, and his counsel in the underlying action, defendant Krentsel & Guzman LLP, raises no triable issue as to its receipt of the notice of the lien claimed to be sent by the plaintiffs. Indeed, counsel never clearly denies receipt of the notice but merely argues that the plaintiffs have failed to meet their burden in the first instance by eliminating any triable issue as to notice. The argument is without merit here. Notably, the law firm defendant does not allege whether or not it is its routine practice to inquire of its clients regarding the existence of any liens before negotiating a settlement or disbursing or accepting proceeds of a settlement. Indeed, since the client here, defendant Sharkey, was injured in the course of his employment, logic would dictate that workers' compensation benefits were involved and that there may be a lien.

The defendants fail to raise any triable issue to warrant denial of the plaintiffs' motion for summary judgment, and do not establish entitlement to any relief under CPLR 3211(a)((1) or (7).

Finally, the defendants argue that, should the court grant summary judgment to the plaintiffs, it should award the plaintiffs only $41,499.54, since their proof reflects only that amount, as opposed to the $43,247.75 demanded in the complaint or any larger sum now sought on the motion. That application is granted.

Accordingly, upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiffs' motion for summary judgment is granted, and it is further,

ORDERED that the defendants' cross-motion is denied, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiffs and against the defendants, jointly and severally, in the sum of $41,499.54. with costs and statutory interest from July 1, 2016.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

4/28/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

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| X | CASE DISPOSED | | NON-FINAL DISPOSITION | | | | |
| X | GRANTED | | DENIED | | GRANTED IN PART | | OTHER |