New Hampshire Ins. Co. v Krentsel & Guzman, LLP
2020 NY Slip Op 33630(U)
October 28, 2020
Supreme Court, New York County
Docket Number: 657213/2017
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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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 9/24/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

I. INTRODUCTION

In this action to recover workers compensation benefits paid to defendant Brian Sharkey by the plaintiffs New Hampshire Insurance Company and Verizon New York Inc., this court, by order dated April 28, 2020, granted summary judgment to the plaintiff and against Sharkey and his counsel, defendant Krentsel & Guzman LLP, in the sum of $41,499.54. The defendants now move pursuant to CPLR 2221 to renew and reargue the plaintiffs' motion for summary judgment and pursuant to CPLR 5015(a)(3) to vacate this court's April 28, 2020 order. The defendants seek to reduce the amount they are required to pay to the plaintiffs to $28,255.20, rather than $41,499.54. The plaintiffs oppose the motion.

II. BACKGROUND

Defendant Sharkey sustained personal injuries in 2013 while working for Verizon, apparently being attacked by a dog. Following his injury, Sharkey received workers compensation benefits from the plaintiffs in excess of $40,000. Sharkey thereafter commenced a personal injury action that settled for $175,000.00. Sharkey's counsel, defendant Krentsel & Guzman LLP, claim to have bene unaware of the workers compensation lien when they settled the matter. The plaintiffs maintain that they notified the defendants prior to the settlement about the lien and made several inquiries as to the status of the litigation, but the defendants were not

responsive. After learning of the settlement, the plaintiffs informed the defendants of the amount of the lien and demanded payment. The defendants refused to pay, and the plaintiffs' attempts to settle with the defendants failed. This action ensued.

On September 10, 2019, the plaintiffs moved for summary judgment seeking $44,647.75, the current amount of the lien. At oral argument on the summary judgment motion, counsel appearing for the defendants represented that, should they be found liable, a lesser amount suggested by the plaintiffs, $41,499.54, would be acceptable as it was less than the amounts previously first demanded by the plaintiffs. By an order dated April 28, 2020, this court granted summary judgment to the plaintiffs in the amount of $41,499.54. The defendants then filed the instant motion.

III. DISCUSSION

In their motion, the defendants claim (1) that the court overlooked the portion of their opposition which argued that the plaintiffs' lien should have been calculated at $28,255.20 instead of $41,499.54 to account for "reasonable and necessary expenditures including attorneys' fees, incurred in effecting such recovery" pursuant to New York Workers' Compensation Law § 29, and (2) that the plaintiffs concealed an email dated October 27, 2017, sent from Derek Wadle, a claims recovery examiner for Sedgwick Claims Management Services, Inc., the third-party administrator for Verizon, to both name partners of the defendant law firm which mentioned the $28,255.20 number.

The portion of the defendants' motion seeking re-argument is granted and, upon re-argument, the court adheres to its prior determination. See CPLR 2221(d)(2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992), *lv dismiss in part and denied in part* 80 NY2d 1005 (1992). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 [1st Dept. 1984], *quoting* Foley v Roche, 68 AD2d 558, 567 [1st Dept. 1979]) "or to present arguments different from those originally asserted" (Matter of Setters v AI Props. and Dev. (USA) Corp., 139 AD3d at 492 [1st Dept. 2016] *quoting* William P. Pahl Equip. Corp. v Kassis, supra at 27).

The 2017 email upon which the defendants rely states that $28,255.20 would be accepted in settlement of the workers' compensation lien after allocating litigation costs between

Sharkey and the plaintiffs per the "Kelly" formula (Kelly v State Ins. Fund, 60 NY2d 131 [1983]). Wadle explains that the lien amount was for $43,247.75 but offers to accept $28,255.20 in settlement of the claim. Wadle also expresses frustration that the defendant law firm was not responding to the plaintiffs' demand for payment and was not "taking responsibility" for not knowing about the lien before settling the personal injury action. This email was submitted by the plaintiffs in support of their motion for summary judgment, as Exhibit G to an affidavit of Christopher Martin, also of Sedgewick. In that affidavit, Martin confirms that the unpaid lien amount had increased to $44,647.75.

As correctly argued by the plaintiffs, the defendants proffer no persuasive statutory of decisional authority to support a reduction in the amount awarded under the circumstances presented here. The intent of the litigation cost sharing provision of Workers Compensation Law §29 cited by the defendants is to allocate some of cost of obtaining the settlement to the insurance carrier, who also benefits from the settlement obtained by the insured. See Kelly v State Ins. Fund, supra. Here, however, the defendants' conduct in settling the personal injury action without paying or even considering the workers compensation lien, and then refusing to pay when payment was demanded by the plaintiffs, occasioning further litigation, is such that forcing the plaintiffs to share in the litigation costs in excess of the approximately $3,000.00 it has already paid by reducing its demand, would simply be illogical.

Nor is renewal an appropriate remedy. CPLR 2221(e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination…and shall contain reasonable justification for the failure to present such facts on the prior motion." The defendants argue for renewal based upon the October 27, 2017 email, and the email was offered on the prior motion. Moreover, since the email was sent to two partners of the defendant law firm in 2013, they cannot be heard to claim they did not know of it.

For the same reason, the portion of the defendants' motion seeking to vacate the April 28, 2020, order pursuant to CPLR 5015(a)(3), also based upon the same email, is likewise without merit. Relief under CPLR 5015(a)(3) requires "fraud, misrepresentation, or other misconduct of an adverse party." Although the defendants argue that the plaintiffs are guilty of some misconduct by concealing the email on the prior motion, that argument is untenable as the plaintiffs submitted the email on the prior motion and it was sent to the principals of the

defendant law firm. As such, the defendants have failed to establish any basis to alter the amount awarded in the prior order.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the defendants' motion is granted to the extent that the branch of the motion which seeks re-argument is granted and, upon re-argument, the court adheres to its prior determination, and the motion is otherwise denied, and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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

10/28/2020
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	