SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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THE NEW YORK BLACK CAR OPERATORS INJURY COMPENSATION FUND INC.,

Plaintiff,

- v -

ERIC GREEN, LAW OFFICES OF ERIC H. GREEN & ASSOCIATES, and MEDHAT SELWANES,

Defendants.

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INDEX NO. 452139/2018

MOTION DATE 10/28/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

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

ORDER

Upon the foregoing documents, it is

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants in the sum of $ 1,869.66, in collection fees, plus $ 8,498.47, with interest, on the latter, at the rate of 3.5% per annum from the date of March 2, 2018, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

DECISION

Defendants argue that plaintiff is not entitled to any payment under Workers' Compensation Law § 29(1-a), which provides that the workers' compensation carrier shall not have a lien on the proceeds of any recovery received pursuant to Insurance Law § 5104(a) for compensation paid in lieu of first party benefits in a third-party action. Plaintiff is correct that defendants incorrectly disregard the terms of Insurance Law § 5104(a) that applies explicitly to recovery received 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" (emphasis supplied). Defendants likewise ignore the plain language of Insurance Law § 5104(b), which provides"

> "In an 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 . . . 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" (emphasis supplied).

Insurance Law § 5102(j) defines "covered person", as follows:

> "'Covered person' means 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"(emphasis supplied).

Hunter v OOIDA Risk Retention Group, Inc. (71 AD3 1, 11 [2d Dept 2010}), cited by plaintiff in its reply papers, held in pertinent part:

> "'[P]roof of financial security' consists of an 'owner's policy of liability insurance,' which (1) affords minimum 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 Commission 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 the Vehicle and Traffic Law article 6 (Vehicle and Traffic Law § 311[3], [4] [a], [d]; see 111 NYCRR 60-1.1)." (Emphasis supplied.)

This court disagrees with defendants that in its original moving papers, plaintiff failed to prima facie establish that the insurance carrier of the driver/owner of the offending vehicle that struck defendant Selwanes was unauthorized to do business in New York State. It is true that neither the complaint, which was verified by plaintiff's attorney, nor the supporting affirmation of plaintiff's attorney has any probative value. However, the initial supporting affidavit of plaintiff's Loss Prevention Specialist, a person with knowledge, constitutes admissible evidence that the carrier in question was not authorized to do business in New York State. Attached to and incorporated by reference in such affidavit is the letter dated

April 16, 2018 from such Loss Prevention Specialist to defendant law firm. Such letter states, in pertinent part:

> "As tortfeasor carrier Plymouth Rock Assurance does not write business in New York State, and is thus not a member of the Intercompany Arbitration, there is no $50,000 (first-party benefit) offset."

By letter dated April 18, 2018, defendant law firm responded to such letter. However, rather than deny such assertion, defendant law firm replied with the following non sequitur:

> "Based upon New York law, we do not believe any lien can be asserted as this matter involves a New York resident, a New York accident and a New York case."

In their opposition papers, defendants come forward with no evidence that tends to refute the statement of plaintiff's Loss Prevention Specialist that tortfeasor carrier Plymouth Rock Assurance does not write business in New York State. In fact, the letter dated April 18, 2018, from defendant law firm, states that the basis for defendants' refusal to pay off the lien was not the subject insurance carrier's authorization to do business in New York, but the residency of defendant Selwanes, the situs of the accident and the venue of the underlying lawsuit, the latter which beg the question of "proof of financial security".

Therefore, pursuant to Workers' Compensation Law §29(1), plaintiff is entitled to summary judgment against defendants in the amount of its lien on the proceeds of the settlement.

Plaintiff is also entitled to an award of interest on such amount, at the rate of 3.5% per annum from March 2, 2018, the date of the settlement until the date of the herein decision, pursuant to State Finance Law § 18(4)[1]. In addition, in accordance with State Finance Law § 18(5), plaintiff is entitled to collection fees in the amount of twenty-two percent of the outstanding payment.

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3/22/2021
DATE

DEBRA A. JAMES, J.S.C.

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

[1] See also Tax Law § 1096(e).