

**Continental Indem. Co., PBM, LLC v Redzematovic**

2022 NY Slip Op 30483(U)

February 14, 2022

Supreme Court, New York County

Docket Number: Index No. 156930/2021

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

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**INDEX NO. 156930/2021**

CONTINENTAL INDEMNITY COMPANY, PBM, LLC

**MOTION DATE 11/24/2021**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

AISA REDZEMATOVIC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, defendant’s motion seeking an Order granting defendant summary judgment and dismissing the complaint and plaintiff’s cross-motion seeking an Order granting summary judgment declaring Plaintiffs’ right to assert its Workers’ Compensation lien against the proceeds of Defendant’s legal malpractice action is as follows:

Plaintiffs commenced the instant action by filing a summons and complaint on July 26, 2021, seeking a Declaratory Judgment as to the rights and obligations of the parties pursuant to C.P.L.R. § 3001, specifically a Workers' Compensation Lien Plaintiffs allegedly possess against Defendant's recovery from any third-party action pursuant to section 29 of the Worker's Compensation Law. On November 7, 2021, defendant interposed an answer, filing her motion for summary judgment on the following day.

The Court notes that defendant has failed to submit a Statement of Material Facts pursuant to 22 NYCRR § 202.8-g(a), which provides that: “Upon any motion for summary judgment other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which

the moving party contends there is no genuine issue to be tried.” See, *Amos Financial LLC v. Crapanzano*, 2021 WL 3503946, \*2 (Sup. Ct. Rockland County, July 30, 2021). Ordinarily, this alone requires denial of defendant’s motion. The Court further notes that plaintiff did submit a statement of material facts, which has not been countered by defendant and establishes as follows:

Defendant received Workers’ Compensation payments from Plaintiffs following an injury suffered in a work-related elevator malfunction on May 27, 2014. Defendant’s previous attorneys failed to file suit against the correct parties, resulting in a legal malpractice action against said previous attorneys, captioned *Aisa Redzematovic v. Fink et al*, Sup. Ct. NY Cty. Index No. 159070/2018 that resulted in settlement in the total amount of \$940,000.00. Defendant has acknowledged receipt of Plaintiff’s demand letter, dated May 19, 2021, advising of the Workers’ Compensation lien in the amount of \$274,302.54 at issue herein and asserting same. Defendant has refused to satisfy the lien resulting in the instant action.

Defendant contends that the Workers’ Compensation lien does not apply, citing *Shutter v. Phillips Display*, 90 NY2d 703 (1997), which holds that "Workers' Compensation Law § 29(4) specifically authorizes application of the lien or offset only against a specific category of recoveries - i.e., those constituting the proceeds of an action against "such other." The term "such other" relates back to the earlier mention in section 29 (1) of the person whose "negligence or wrong" causes the claimant's harm. Together, these terms indicate that the lien and offset tools may be applied only against recoveries from the third-party tortfeasors who are responsible for the claimant's injuries." Plaintiff’s cited cases are entirely inapposite as *Shutter* specifically applies for the premise that a Workers’ Compensation lien cannot be asserted against “funds claimant recovered from her own insurance carrier under the uninsured motorist benefits endorsement [which] were not recovered from the third-party tortfeasor.” Contrary to defendant’s arguments, it

is well settled that where a “settlement was a substitute for the usual third-party recovery against a negligent tortfeasor or wrongdoer and, as such, it should not have been made without the consent of the allegedly liable compensation carriers ... [s]uch a result fulfills the primary purpose of the statute by denying claimant a double recovery” *McDowell v. LaVoy*, 63 A.D.2d 358, 360 (4th Dept. 1978); *See also, Commissioners of State Ins. Fund v. Motor Vehicle Acc. Indemnification Corp.*, 21 N.Y.2d 918 (1968); *Beth V v. New York State Office of Children and Family Services*, 22 N.Y.3d 80, 91 (2013), *quoting Matter of Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 39 (1966); *Matter of Theresa M.C. v. Utilities Mut. Ins. Co.*, 207 A.D.2d 481, 482 (2d Dept. 1994), *citing McDowell, supra*.

Defendant further contends that the recovery from the legal malpractice action was for non-economic loss only, thus, the Workers’ Compensation lien does not apply to such recovery. It is undisputed that the relevant settlement agreement purports to show that due to the limited coverage, the amount of the settlement was for the non-economic loss only. Defendants arguments concerning the provisions of WCL § 29(1-a) are not relevant to the instant action as WCL § 29(1) “grants a workers' compensation carrier a lien on the proceeds of an employee's direct party action for the amount of compensation awarded”, without distinction to purported economic/noneconomic portions of a settlement. *Dietrick v. Kemper Ins. Co.*, 76 N.Y.2d 248, 251 (1990). Defendant’s contention that plaintiff is estopped under the doctrine of laches from claiming recovery under its lien because it failed to take advantage of the remedies provided to plaintiff pursuant to Workers’ Compensation Law Section 29(2) is similarly without merit.

ORDERED that defendant’s motion is DENIED in its entirety; and it is further

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to assert its Workers' Compensation lien against the proceeds of the settlement of Defendant's legal malpractice action, captioned *Aisa Redzematovic v. Fink et al*, Sup. Ct. NY Cty. Index No. 159070/2018.

2/14/2022  
DATE

  
LAURENCE LOVE, J.S.C.

|                       |                                     |                            |                                 |   |
|-----------------------|-------------------------------------|----------------------------|---------------------------------|---|
| CHECK ONE:            | <input checked="" type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/>        | NON-FINAL DISPOSITION                     |
|                       | <input type="checkbox"/>            | GRANTED                    | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART  |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER               |                                 | <input checked="" type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>        | FIDUCIARY APPOINTMENT                     |
|                       |                                     |                            | <input type="checkbox"/>        | REFERENCE                                 |