

New York Black Car Operators Injury Compensation Fund Inc v Siler & Ingber LLP
2022 NY Slip Op 32155(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 453233/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

THE NEW YORK BLACK CAR OPERATORS INJURY
COMPENSATION FUND INC,

Plaintiff,

INDEX NO. 453233/2021

MOTION DATE 01/07/2022

MOTION SEQ. NO. 001

- v -

SILER & INGBER LLP, CHRISTOPHER BAPTISTE,
RONALD INGBER

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

In the instant action, defendants Siler & Ingber LLP, Christopher Baptiste, and Ronald Ingber move, pursuant to CPLR 3211(a)(7), for, inter alia, an order dismissing the complaint for failure to state a cause of action (motion seq. No. 001). Plaintiff The New York Black Car Operators’ Injury Compensation Fund Inc., cross-moves, pursuant to CPLR 3212, for summary judgment against defendants, seeking to recover a sum of \$11,972.23, plus interest, and a statutory collection fee of \$2,633.89. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, defendants’ motion to dismiss and plaintiff’s cross motion for summary judgment are decided as follows.

Factual and Procedural Background

In May 2018, defendant Christopher Baptiste (“Baptiste”) was injured in a motor vehicle accident during the course of his employment (Doc No. 1 at 3-4). As a result, Baptiste submitted a workers’ compensation claim to the Workers’ Compensation Board, seeking reimbursement for lost wages and medical treatment costs (Doc No. 1 at 5). Plaintiff, a not-for-profit corporation

established under Executive Law § 160-DD and the workers' compensation carrier for Baptiste's employer, covered the claim and paid Baptiste a total of \$11,972.23 (Doc No. 1 at 5). Baptiste then retained defendants Ronald D. Ingber and Siler & Ingber LLP to initiate a negligence action against Shane Davis ("Davis") and Ahmed Shougare ("Shougare") — two individuals who were allegedly negligent or caused the May 2018 accident ("the negligence action") (Doc No. 1 at 6; Doc No. 8 at 1). Thereafter, defendants discontinued the negligence action after settling it with Safe Auto Insurance Company, Davis' insurance carrier, which tendered its policy limit of \$15,000 (Doc No. 1 at 6-7; Doc No. 10 at 1), making payment to defendants herein on February 25, 2019.

In September 2021, plaintiff commenced the captioned action asserting that it had a lien on the proceeds of the settlement defendants obtained in the negligence action (Doc No. 1). Plaintiff sought to recover the \$11,972.23 it previously paid to cover Baptiste's workers' compensation claim, plus interest (Doc No. 1 at 7-11). Plaintiff also sought to recover a collection fee of \$2,633.89 under State Finance Law ("SFL") § 18 (Doc No. 1 at 11), which allows a state agency to collect an additional fee when a debtor fails to repay a debt owed to such agency.

Defendants now move, pursuant to CPLR 3211(a)(7), for an order: (1) dismissing the complaint for failure to state a cause of action, (2) compelling plaintiff to approve the settlement obtained by defendants in the negligence action, and (3) awarding them attorneys' fees in the amount of \$2,500 (Doc No. 5). Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and awarding it the monetary sum it sought in its original complaint — \$11,972.23, plus interest, and an additional \$2,633.89 collection fee pursuant to SFL § 18 (Doc No. 13).

Legal Conclusions

Defendants' Motion to Dismiss

In reviewing a motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*New York Hosp. Med Ctr. of Queens v Microtech Contr. Corp.*, 98 AD3d 1096, 1101 [2d Dept 2012], *affd* 22 NY3d 501 [2014]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Importantly, “the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one” (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 602 [1st Dept 2016] [internal quotation marks and citations omitted], *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Workers' Compensation Law (“WCL”) § 29 generally allows a workers' compensation claimant to pursue an action against an alleged tortfeasor (*see* WCL § 29 [1]; *Matter of Terranova v Lehr Constr. Co.*, 30 NY3d 564, 567 [2017]). Yet, “[i]n the event that a claimant recovers in a third-party action, the compensation carrier is granted a lien on the amount of the recovery proceeds equal to the amount of past compensation it has paid, with interest” (*Terranova*, 30 NY3d at 567, quoting *Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 136 [1983]; *see Matter of Djukanovic v Metropolitan Cleaning LLC*, 194 AD3d 1275, 1277 [3d Dept 2021]). However, a workers' compensation carrier cannot impose a lien on the proceeds of any recovery obtained under Insurance Law § 5104(a) (*see* WCL § 29 [1-a]), a statute that prevents certain recoveries in actions brought by a “covered person against another covered person” (Insurance Law § 5104 [a]). A “covered person” is, among other things, an owner, operator, or

occupant of a motor vehicle that has the appropriate insurance as required by the Vehicle and Traffic Law (“VTL”) (*see* Insurance Law § 5102 [j]; VTL § 311; *Hunter v OOIDA Risk Retention Group, Inc.*, 79 AD3d 1, 10-12 [2d Dept 2010]).

A review of the pleadings reveals that plaintiff successfully demonstrated that it has a viable cause of action under WCL § 29. In its complaint, plaintiff asserts that Baptiste was a workers’ compensation claimant after a motor vehicle accident, that it covered his claim, and that it reimbursed him for lost wages and medical expenses (Doc No. 1 at 5). Plaintiff also asserts that defendants initiated the negligence action, which was subsequently discontinued after it was settled (Doc No. 1 at 6-7). According to plaintiff, the \$15,000 settlement was paid by Davis’ insurance carrier and represented the full limit of Davis’ policy (Doc No. 1 at 6).

Accepting these facts as true, defendants’ recovery cannot be classified as one “received pursuant to [Insurance Law § 5104(a)]” (WCL § 29 [1-a]), because the negligence action was not an action “by or on behalf of a covered person against another covered person” (Insurance Law § 5104 [a]). A “covered person” is an individual who satisfies the insurance requirements of VTL § 311, meaning he or she has an insurance policy providing at least \$25,000 in liability coverage (*see* Insurance Law § 5102 [j]; VTL § 311 [4]). The maximum liability coverage under Davis’ policy was only \$15,000 — well below the \$25,000 minimum amount of coverage required by VTL. Therefore, Davis was not a “covered person” and the negligence action was not the type covered by Insurance Law § 5104(a). Thus, defendants’ recovery in that action is not protected by WCL § 29(1-a). Instead, defendants’ recovery falls within the scope of WCL § 29(1), which allows for the imposition of a lien (*see Terranova*, 30 NY3d at 567; *Djukanovic*, 194 AD3d at 1277). Therefore, plaintiff has a viable cause of action asserting a lien on the

proceeds of defendants' settlement (*see Continental Indem. Co. v Redzematovic*, ___ AD3d ___, 2022 NY Slip Op 03866, *1 [1st Dept 2022]).

Contrary to its contentions, however, plaintiff is not entitled to a collection fee under SFL § 18. “That statute authorizes a collection fee, not to exceed 22% of the outstanding debt,” when a debtor has failed to make payment within 90 days of receiving a bill from a state agency (*New York State Thruway Auth. v Allied Waste Servs. of N. Am., LLC*, 143 AD3d 1145, 1146-1147 [3d Dept 2016]; *see* SFL § 18 [5]). The debt, however, must be liquidated, meaning that it “has been determined to be due” (*Lawyers’ Fund for Client Protection of State of N.Y. v Gateway State Bank*, 239 AD2d 826, 828 [3d Dept 1997], *lv dismissed* 91 NY2d 848 [1997]; *see* SFL § 18 [1]; *New York State Thruway Auth.*, 143 AD3d at 1147). Thus, a debt is unliquidated until a judgment is entered on it (*see Lawyers’ Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 256 AD2d 836, 838 [3d Dept 1998], *affd* 94 NY2d 398 [2000]). Here, there is no evidence that plaintiff has provided defendants with an invoice or notice as required by the statute (*see* SFL § 18 [5]). Further, there is no judgment declaring that the debt is due — that is the purpose of the captioned action. Therefore, the debt is unliquidated and plaintiff is not entitled to the 22% collection fee under the statute (*see Gateway State Bank*, 239 AD2d at 828).

Last, defendants request for an order compelling plaintiff to consent to the settlement in the negligence action is without merit. “[A] claimant settling a third-party action must either obtain written approval of the settlement from the payor of workers’ compensation benefits or seek a compromise order from the court in which the third-party action is pending” (*Merrill v Moultrie*, 166 AD2d 392, 392 [1st Dept 1990], *lv denied* 77 NY2d 804 [1991]; *see* WCL § 29 [5]). Here, plaintiff has not consented to the settlement and, further, defendants seek a compromise order in the wrong forum, since the negligence action was commenced in Kings

County, not in New York County. Thus, defendants request for an order compelling plaintiff to consent to the settlement is denied (*see Matter of Urig v Cigna Prop. & Cas. Cos.*, 209 AD2d 626, 626-627 [2d Dept 1994]).

Plaintiff's Cross Motion for Summary Judgment

To be awarded summary judgment, plaintiff must first “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If plaintiff satisfies its burden, the burden shifts to defendants to demonstrate the existence of material, triable questions of facts (*see id.*). Plaintiff has satisfied its initial burden because it demonstrated that, pursuant to WCL § 29, it was entitled to a lien on the proceeds of defendants’ settlement in the negligence action. Plaintiff established that it compensated Baptiste by paying his workers’ compensation claim, that defendants initiated the negligence action and obtained a recovery in the form of a settlement, and that the recovery was not of the kind protected by WCL § 29(1-a) and Insurance Law § 5104(a). The proceeds from the settlement, therefore, fall into the category of proceeds covered by WCL § 29(1), thereby entitling plaintiff to a lien on those proceeds and to recover an amount equal to the compensation it paid previously, plus interest (*see Continental Indem. Co.*, 2022 NY Slip Op 03866, *1). Thus, the burden shifts to defendants to demonstrate the existence of material, triable questions of fact. Defendants fail to satisfy their burden, since their argument simply reiterates their position that WCL § 29(1-a) does apply to the facts of this case.

However, plaintiff has not established that it is entitled to judgment as a matter of law on its claim for an additional collection fee under SFL § 18. As stated above, to be awarded a collection fee under the statute, there must be a liquidated debt. Here, there is no such liquidated

debt; plaintiff “merely has an inchoate claim” to a lien on the proceeds from defendants’ settlement in the negligence action (*Gateway State Bank*, 239 AD2d at 828). Because a collection fee cannot be awarded without a liquidated debt, plaintiff has not demonstrated that it is entitled to one. This Court has considered the parties’ remaining contentions, which are either without merit or need not be addressed given the findings set forth above.

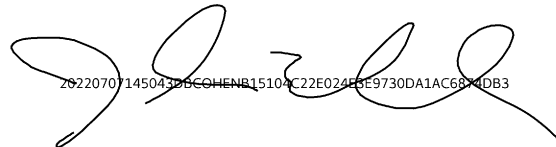
Accordingly, it is hereby:

ORDERED that defendants’ motion to dismiss is granted to the extent that the portion of plaintiff’s complaint seeking a collection fee under SFL § 18 is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiff’s cross motion for summary judgment is granted to the extent that plaintiff is entitled to a lien on the proceeds of the settlement from defendants’ action against Davis and Shougare, and the cross-motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$11,972.23, with interest thereon at the statutory rate from February 25, 2019.

7/7/2022
DATE



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DAVID B. COHEN, J.S.C.

CHECK ONE:

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