

**Eralis v Black Car Fund**

2023 NY Slip Op 33892(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 517975/22

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31<sup>st</sup> day of October, 2023.

PRESENT:

HON. RICHARD VELASQUESZ, Justice.

-----X  
JEAN PHILLIPE ERALIS,

Plaintiff,

-against-

BLACK CAR FUND,

Defendant.  
-----X

Index No. 517975/22

*mot. seq. 1*

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and

Affidavits (Affirmations) Annexed \_\_\_\_\_ 2-3

Opposing Affidavits (Affirmations) \_\_\_\_\_ 9

Affidavits/ Affirmations in Reply \_\_\_\_\_ 17-18

Upon the foregoing papers, plaintiff Jean Phillipe Eralis moves, by order to show cause, for an order vacating, nullifying, and extinguishing the workers' compensation lien of defendant Black Car Fund in the amount of \$9,357.90 asserted against plaintiff's settlement proceeds recovered in a third-party motor vehicle action.

On July 1, 2017, plaintiff was injured when the vehicle he was operating, owned by American United Transportation, was struck by a vehicle operated by Mathew E. Alves and owned by Freedom Rides, Inc. Since the accident happened during the course of plaintiff's employment, he filed a claim with defendant for workers'

compensation benefits. Defendant thereafter paid plaintiff the sum of \$17,0863.12, including \$6,233.42 for indemnity benefits and \$10,852.70 for medical benefits.

On January 30, 2018, plaintiff commenced a third-party action against Alves and Freedom Rides, Inc. According to the petition in the instant proceeding, plaintiff settled his third-party non-economic loss (pain and suffering) claim for \$15,000.00 (the limit that plaintiff was able to recover under the policy of the third-party insurance carrier), with a net recovery to plaintiff of \$9,400. On March 25, 2022, plaintiff's counsel received a letter from defendant's counsel consenting to the settlement of the third-party action in the amount of \$15,000.00. In the letter, defendant's counsel stated:

"The parties agree that the case of Kelly v. State Insurance Fund, 60 N.Y.2d 131 (1983), applies. The carrier has a lien for all indemnity and medical benefits paid in this file as the third party action defendant is not deemed a "covered person" under Article 51 of the NYS Insurance Law. There is no \$50,000.00 offset. See NYS Insurance Law Section 5104, Marshall v. Nationwide Ins. Co. 166 A.D.2d 852 (3d Dep't 1990). The carrier's recoverable lien, after deducting the proportionate cost of litigation, exceeds the overall settlement proceeds after deducting your cost of litigation. The carrier agrees to accept the sum of \$9,357.90 in satisfaction of its lien. There is no net recovery to the claimant given the carrier's recoverable lien."

In the petition and affirmation in support of the order to show cause, plaintiff argues that when a third-party action involves a motor vehicle accident, a workers' compensation lien does not apply to the first \$50,000.00 of benefits received. Plaintiff maintains that because the accident happened in the County of Kings, State of New York, Insurance Law § 5104 (a) and Workers' Compensation Law [WCL] § 29 (1-a) apply. WCL § 29 (1-a) provides an exception to a workers' compensation lien and disallows recoupment or offset of benefits intended to compensate for a claimant's loss

from the proceeds of a recovery of first party benefits received pursuant to Insurance Law 5104 (a). First party benefits are payments of up to \$50,000 intended to reimburse the injured person for his or her basic economic loss, including lost wages and medical expenses (Insurance Law § 5102 [a], [b]).

The issues herein ultimately involve the interaction between Insurance Law §§ 5104 (a) and (b), and WCL §§ 29 (1) and (1-a).

WCL § 29 (1) provides that a workers' compensation carrier has the right to assert a lien against the proceeds of a claimant's third-party action for the claimant's injuries (see *Dietrick v Kemper Ins. Co.*, 76 NY2d 248 [1990]; *Matter of Buck v Graphic Arts Mut. Ins. Co.*, 19 AD3d 966, 967 [3d Dept 2005]). WCL § 29 (1-a) limits the application of that statute and provides that a carrier cannot assert a lien against proceeds received pursuant to Insurance Law § 5104 (a), for compensation or benefits which were paid in lieu of first party benefits which another insurer would have otherwise been obligated to pay in an action by a covered person against another covered person, for injuries arising out of the negligent use or operation of a motor vehicle (see *Buck*, 19 AD3d at 967; *McHenry v State Insurance Fund*, 236 AD2d 88, 90-91 [3d Dept 1997]).

Insurance Law § 5104 (a) applies to actions by a covered person against another covered person. Insurance Law § 5104 (b) permits a lien in any action by a covered person against a "non-covered" person in any action for injuries arising out of the use and operation of a motor vehicle. Thus, where the third-party action does not involve a covered defendant, Insurance Law § 5104 (b) rather than Insurance Law § 5104 (a) applies. If the claimant's third-party action "was not governed by Insurance Law § 5104

(a)," the workers' compensation carrier's rights to attach a lien "are not affected by the limitation [of WCL § 29 (1-a)]" (*McHenry*, 236 AD2d at 91).

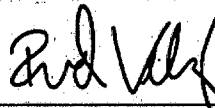
Thus, the question of the viability of defendant's lien hinges on a showing that the owner and/or operator of the third-party vehicle is a covered person, so that the lien exception under WCL § 29 (1-a) is applicable, rather than a "non-covered person," whereby a lien may be properly attached to the settlement recovered in the third-party action (see *Marshall v Nationwide Mut. Ins. Co.*, 166 AD3d 852 [3d Dept 1990]).

In this proceeding, plaintiff has not offered proof establishing that the third-party defendant(s) were, in fact, "covered" within the meaning of the Insurance Law, such that Insurance Law § 5104 (a) applies and the defendant's lien is precluded under WCL § 29 (1-a). Further, there is no evidence to substantiate plaintiff's argument that the \$15,000 in settlement proceeds from the third-party action was intended only to compensate plaintiff for "pain and suffering" rather than basic economic loss and, regardless, a lien under WCL § 29 (1) is "valid against any recovery," including sums denominated compensation for pain and suffering" (*Scannell v Karlin*, 252 AD2d 552, 553 [2d Dept 1998]).

As a result, the instant order to show cause is denied and the instant proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER FORTHWITH:



HON. RICHARD VELASQUES, J.S.C.

Hon. Richard Velasquez, JSC

OCT 31 2023