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

PRESENT: Justice BARBARA JAFFE J.S.C. PART 5

Index Number : 104884/2003
MONDA, BARTOLOMEO
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 007
COMPEL
CAL #76

INDEX NO. 104884/03
MOTION DATE 6/28/11
MOTION SEQ. NO. 007
MOTION CAL. NO. 76

this motion to/for compel consummation of settlement

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

SEP 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/19/11 SEP 21 2011

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

BARTOLOMEO MONDA,

Plaintiff,

-against-

CITY OF NEW YORK and CONSOER TOWNSEND ENVIRODYNE ENGINEERS, INC.,

Defendants.

----------x

CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

NORTHSTAR CONTRACTING CORP. a/k/a NORTHSTAR ELECTRICAL CONTRACTING CORP.,

Third-Party Defendant.

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Index No. 104884/03

Argued: 6/28/11
Motion Seq. No.: 007
Motion Cal. No.: 76

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Harry I. Katz, Esq.
Harry I. Katz, P.C.
61-25 Utopia Parkway
Fresh Meadows, NY 11365
718-463-3700

For Northstar, Elite, and Neuman:
Altagracia A. Davis, Esq.
Davis & Venturini
176 Woodbury Road
Hicksville, NY 11801
516-933-4080

By notice of motion dated March 22, 2011, plaintiff moves pursuant to Workers Compensation Law § 29(5) for an order compelling Elite Contractors Trust of New York (Elite), Workers Compensation carrier for third-party defendant Northstar Contracting Corporation (Northstar), and Neuman Claims Administrators (Neuman), its third-party administrator, to consent to a proposed settlement, and an order declaring that the Workers Compensation lien be reduced to zero. Northstar, Elite, and Neuman oppose and, without serving a notice of cross-

motion, seek an order compelling plaintiff to reimburse them for Workers Compensation benefits paid by them.

I. BACKGROUND

On July 24, 1998, plaintiff, a construction laborer, sustained physical injuries as a result of a work-related accident for which he received and continues to receive Workers Compensation benefits. (Affirmation of Harry I. Katz, Esq., dated March 22, 2011 [Katz Aff.]). Following the accident, he returned to work full-time, and on September 27, 2002, sustained additional physical injuries as a result of a second work-related accident. (Affirmation of Harry I. Katz, Esq., in Reply, dated Apr. 28, 2011 [Katz Reply Aff.]). Plaintiff never returned to work. (*Id.*).

On March 17, 2003, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting negligence claims against defendants arising from the September 27, 2002 accident. (Katz Aff., Exh. A). Sometime later, City commenced a third-party action against Northstar. (*Id.*).

By letter dated April 27, 2005, Compensation Risk Managers, LLC, then Elite's third-party administrator, informed plaintiff that its Workers Compensation lien totaled $90,335.09. (*Id.*, Exh. E).

On July 1, 2008, plaintiff received from Elite a lien statement indicating that the Workers Compensation lien totaled $170,375.54. (*Id.*, Exh. F).

In July of 2010, defendants offered plaintiff $610,000 to settle the matter. (*Id.*, Exhs. B, C).

By letter dated July 30, 2010, plaintiff apprised Neuman of the settlement offer and that he had been declared permanently totally disabled and requested that it consent in writing to the

settlement. (*Id.*, Exh. G).

By letter dated August 6, 2010, Neuman informed the Special Funds Conservation Committee (Special Funds) that its lien totaled $170,375.54 and asked that it consent to the settlement. (*Id.*, Exh. H).

On or about September 2, 2010, plaintiff received from Neuman an itemized statement indicating that it paid him $188,206.50 in Workers Compensation benefits between September 27, 2002 and August 1, 2010. (*Id.*, Exh. I).

On December 2, 2010, a Workers Compensation Law judge determined after a hearing that Northstar and/or Elite must pay plaintiff $400 a week in Workers Compensation benefits, that the benefits are apportioned 75 percent to the September 27, 2002 accident and 25 percent to the July 24, 1998 accident, retroactive to March 16, 2004, and that the award is without prejudice to Workers Compensation Law § 15(8), which provides that a carrier may seek reimbursement for benefits paid where a claimant had a preexisting injury if it can demonstrate that the injury is more severe than it would have been from the subsequent accident alone. (*Id.*, Exh. K).

By letter dated December 10, 2010, Neuman informed plaintiff that it was not consenting to the settlement and asked that he provide it with a formal written request for its consent, specifying that portion of the settlement attributable to the September 27, 2002 accident. (*Id.*, Exh. J). By letter dated December 14, 2010, plaintiff responded that the entire settlement related to the September 27, 2002 accident and requested Neuman's consent thereto. (*Id.*, Exh. L).

By letter dated December 17, 2010, Special Funds informed Neuman that its claim for reimbursement pursuant to Workers Compensation Law § 15(8) pended, that it provisionally consents to the settlement, and that it asserts "full offset and credit rights" against plaintiff's net

recovery. (Affirmation of Altagracia A. Davis, Esq., in Opposition, dated Apr. 25, 2011 [Davis Opp. Aff.]).

By letter dated December 22, 2010, Neuman informed plaintiff that the total amount of its lien was $170,375.54, that Special Funds provisionally consented to the settlement, and that it consented to the settlement subject to satisfaction of its $56,791.85 lien. (*Id.*, Exh. M).

By letter dated December 24, 2010, plaintiff asked Neuman to recalculate the lien to reflect the Workers Compensation Law judge's apportionment (*id.*, Exh. N), and by letter dated January 4, 2011, Neuman told plaintiff that the numbers included in its December 22, 2010 letter took into account the apportionment (*id.*, Exh. O).

On February 8, 2011, a Workers Compensation Law judge determined, after another hearing, that Northstar and/or Elite must continue to pay plaintiff $400 per week and that this amount was still subject to the 75 percent/25 percent apportionment. (*Id.*, Exh. P).

II. PLAINTIFF'S MOTION

A. Contentions

Plaintiff claims that, pursuant to *Matter of Kelly v State Insurance Fund*, 60 NY2d 131 (1983), Elite and Neuman should pay their pro rata share of his counsel fees and litigation costs, and upon that apportionment, the lien will be reduced to zero. (*Id.*). In support of this claim, plaintiff sets forth a calculation of Elite and Neuman's pro rata share demonstrating that the amount exceeds the amount of the lien attributed to the September 27, 2002 accident. (*Id.*).

In opposition, Northstar, Elite, and Neuman concede that plaintiff was classified as permanently totally disabled but nevertheless contend that, pursuant to *Burns v Varriale*, 9 NY3d 207 (2007), *Matter of Kelly* is inapplicable, as plaintiff's Workers Compensation benefits have been apportioned between the July 24, 1998 and September 27, 2002 accidents, and thus, that

plaintiff's calculation of their future benefits payment obligation is speculative. (Davis Opp. Aff.).

In reply, plaintiff maintains that apportionment of his benefits does not render *Matter of Kelly* inapplicable, as no specific finding was made as to whether the second accident alone caused his permanent disability, and the judge's decision was made without prejudice to Elite and Neuman's right to seek reimbursement pursuant to Workers Compensation Law § 15(8). (Katz Reply Aff.). In any event, he claims that *Matter of Kelly* applies regardless of whether one or both of the accidents caused his disability, as he cannot return to work and will thus continue to receive the same benefits. (*Id.*).

B. Analysis

"Section 29 of the Workers Compensation Law governs the rights and obligations of employees, their dependents, and compensation carriers with respect to actions arising out of injuries caused by third-party tortfeasors." (*Matter of Kelly*, 60 NY2d at 136). That statute permits a claimant to bring an action against a third-party tortfeasor and continue to receive Workers Compensation benefits and provides that if he recovers in that action, the Workers Compensation carrier is granted a lien on that recovery in an amount equal to the compensation it paid plus interest thereon. (Workers Compensation Law § 29[1]). As a claimant must obtain the carrier's written consent before settling with a third-party tortfeasor, he may move pursuant to Workers Compensation Law § 29(5) for a compromise order if the carrier withholds consent. (*Matter of Johnson v Buffalo & Erie County Private Indus. Council*, 84 NY2d 13, 19 [1994]).

A claimant may also move for an order equitably apportioning his counsel fees and litigation costs between him and the carrier. (Workers Compensation Law § 29[1]). As a claimant's recovery from a third-party tortfeasor benefits the carrier by permitting it to recoup its past benefits payments and extinguishing its future benefits obligations, the Court of Appeals in

Matter of Kelly held that the carrier must "contribute to the costs of litigation in proportion to the benefit it has received," namely the past benefits paid and the present value of its future benefits obligations. (60 NY2d at 140). The carrier's lien is then offset by this amount. (*Id.*).

In *Burns*, the Court limited its holding in *Kelly* to only those cases in which the claimant receives benefits for total disability, death, or schedule loss of use, as the future benefits in these cases may be reliably calculated. (9 NY3d 207). Where a claimant receives total disability benefits, the Court noted, "there is no expectation that he or she will rejoin the workforce[, and] [a]ccordingly, the compensation benefits awarded to such employee do not fluctuate and continue for the duration of the employee's life, which can be reliably predicted using life expectancy tables." (*Id.* at 215-16).

Pursuant to Workers Compensation Law § 15(8), if a claimant had a preexisting injury before sustaining the work-related injury for which he is receiving Workers Compensation benefits, and he has been rendered permanently disabled, the carrier may be reimbursed by the special disability fund if it can demonstrate that the injury "is materially and substantially greater than that which would have resulted from the subsequent injury . . . alone."

Here, there is no dispute that plaintiff has been classified as permanently totally disabled, and thus, he will continue to receive the same total benefits award. Moreover, the Workers Compensation Law judge neither specifically identified the cause of plaintiff's permanent total disability nor indicated that the apportionment would change subject to such a finding. As Northstar, Elite, and Neuman provide no authority for the proposition that apportionment of plaintiff's benefits renders their future benefits obligations speculative, and absent dispute as to how plaintiff calculated their equitable share of his counsel fees and litigation costs, aside from the future benefits, plaintiff is entitled to equitable apportionment of his counsel fees and litigation

costs in accordance with his calculation such that the lien is nullified.

III. CROSS-MOTION

Northstar, Elite, and Neuman's application for an order compelling plaintiff to reimburse them for the Workers Compensation benefits they have already paid and will pay in the future is improperly interposed absent a notice of cross-motion seeking such relief. (CPLR 2215; Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2215:1D [2010 main vol]; Siegel, NY Prac § 249 [3d ed]; *see Rinaldi v Rochford*, 77 AD3d 720 [2d Dept 2010] [to extent plaintiff requested relief in opposition to defendant's motion, relief should have been sought in notice of cross-motion]; *Chun v North Am. Mtge. Co.*, 285 AD2d 42 [1st Dept 2001] [court had no jurisdiction to grant relief to defendants absent notice of cross-motion]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to compel Elite and Neuman to consent to the settlement and to equitably share in his counsel fees and litigation costs such that their Workers Compensation lien is reduced to zero is granted.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 19, 2011
New York, New York

SEP 19 2011

FILED

SEP 21 2011

NEW YORK
COUNTY CLERK'S OFFICE