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

PRESENT: Douglas E. McKeon Justice Supreme Court Justice — PART 38

Della Morales

- v -

NYC H&H

INDEX NO. 101916/05

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided as per Decision dated December 6, 2011.

FILED

DEC 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/21/11

Douglas E. McKeon J.S.C.
Justice Supreme Court

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 38

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DELIA MORALES, by her guardian ad litem EDNA MORALES,

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, DR. AHMAD, DR. ALSAWAAF AND DR. RAMCHARAN (Doctors identified in Harlem Hospital operative record of MR No. 1438067 11/03/03 11th Floor),

Defendants.

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INDEX NO. 101916/05

DECISION/ORDER

HON. DOUGLAS E. MCKEON

At a time when states across the nation wrestle with the reality that the cost of governance must be reduced, certainly expenses related to Medicaid, this court is invited to reduce Medicaid liens enforceable against plaintiff's settlement proceeds by the states of New York and Connecticut based on the holdings of *Arkansas Department of Health and Human Services v Ahlborn* (547 US 268 [2006]) ("*Ahlborn*") and *Lugo v Beth Israel Medical Center* (13 Misc 3d 681 [Sup. Ct., New York County 2006]) ("*Lugo*"). For reasons discussed *infra*, this court declines the invitation.

This is a medical malpractice action which was settled before the undersigned on June 16, 2010 for $4,904,149.16. Settlement was achieved after many months of negotiations, including a significant hiatus to permit plaintiff's counsel an opportunity to ascertain the amount of a Connecticut Medicaid lien.

When the amounts of all Medicaid liens were known, plaintiff's counsel insisted

that the New York City Health and Hospitals Corporation ("HHC") significantly raise a pending settlement offer so that both Medicaid liens could be satisfied *in toto*. Parenthetically, this court was present during all settlement negotiations. After the parties agreed on a settlement amount ($4,904,149.16), a record was made in open court.

The following excerpt is relevant to the issues raised in the instant motion:

> "MR. NOLAN [plaintiff's counsel]: The balance of the gross settlement of $4,904,149 after purchase of the structured payments, the structured policies that were just recited, will be paid in cash and out of that cash will be paid the attorneys' fees and disbursements and *satisfaction of all liens including the Medicaid liens in the State of New York and State of Connecticut*" (emphasis supplied).

Now, after plaintiff's counsel drove up the cost of the settlement because he represented that he would satisfy all Medicaid liens, he requests an allocation hearing, pursuant to *Ahlborn* and *Lugo*, to reduce the amounts of the Medicaid liens. Of course, any post settlement reduction of the liens achieves an unintended and undeserved windfall for plaintiff and deprives Medicaid of its share of settlement proceeds expressly paid to satisfy existing liens. *Ahlborn* does not support such a result. To the extent plaintiff claims *Lugo* does (a view this court does not share), this court declines to follow it. Thus, plaintiff's motion is denied.

Reduced to its basics, *Ahlborn* stands for the proposition that a state or local Social Services agency may only recover a Medicaid lien arising from the tortious conduct of another from that portion of a third-party personal injury recovery which represents past medical expenses. The Medicaid lien in *Ahlborn* was $215,645.30.

Ms. Ahlborn, seriously injured in an automobile accident, settled her case for $550,000. The parties stipulated that the full value of Ms. Ahlborn's suit was at least $3,040,708.18, but was settled for a considerably diminished amount because of Ms. Ahlborn's own culpable conduct.

Using a methodology, which some have now described as an "equitable allocation," the Court in *Ahlborn* ruled that the state could only recover one/sixth of the amount of its Medicaid lien because Ms. Ahlborn was legally limited to a recovery which represented one/sixth of the true value of her case. *Ahlborn* holds that the portion of a settlement (or judgment) which represents damages in excess of past medical expenses is personal property of the plaintiff from which a Medicaid lien cannot be satisfied. To do so, said the Court, violates the anti-lien provisions of the Medicaid statute.

However, where, as here, the parties stipulated that the settlement requires that all Medicaid liens could be satisfied in full, such an agreement is not violative of *Ahlborn*. Just as importantly, plaintiff's counsel does not dispute that the settlement required plaintiff to satisfy all Medicaid liens nor does he contend that settlement was for less than full value. Notwithstanding the clear and unambiguous terms of settlement stated in open court, plaintiff's counsel relies on *Lugo* to achieve a substantial reduction in the amount of the Medicaid liens owed to New York and Connecticut. Most respectfully, in the view of this court, *Lugo* takes *Ahlborn* to a place never intended.

Lugo was an obstetrical case which was settled for $3,500,000 in open court on February 15, 2006 (13 Misc 3d at 681). On "May 17, 2006 [at a] conference on

plaintiff's proposed Infant Compromise Order," plaintiffs, relying on *Ahlborn*, sought a reduction of a $47,349.57 Medicaid lien. In a nutshell, plaintiffs in *Lugo* argued that the injuries suffered by the infant were not settled for full value, citing appellate authorities which sustained jury verdicts for injuries similar to those suffered by the *Lugo* infant for more than the settlement amount. While not agreeing with plaintiffs that an *Ahlborn* formulation could be employed or should be employed to reduce the lien, the court in *Lugo* nonetheless held that "a court determination is necessary to confirm the full value of the case and the value of the various items of damages, including plaintiff's injuries and how they compare to verdicts awarded in other cases" (13 Misc 3d at 688). Despite my great admiration and respect for the *Lugo* court, I disagree that *Ahlborn* requires such a determination.

The only reason *Ahlborn* makes reference to the full value of Ms. Ahlborn's claim is because there was a legal impediment, i.e. her own culpable conduct, which precluded her full recovery of damages. A similar circumstance would be a settlement for less than full value because of limited insurance coverage, i.e. the case is worth more than available insurance. Yet another example is the reduction of available cash in an obstetrical malpractice case because of the recently enacted Medical Indemnity Fund, which substitutes medical services for up-front cash. In other words, *Ahlborn* deals with the scenario of a settlement for less than full value because there is a legal or objective impediment to obtaining full value. In short, Medicaid takes a reduced amount because the plaintiff must take a reduced amount. However, *Ahlborn* does not permit a plaintiff to claim: "I settled my case for $3,000,000 but it's really worth

$10,000,000, now Medicaid must accept 30 cents on the dollar." The value of injuries alone does not dictate the value of a case or settlement. The value of a case is determined by the strength of liability coupled with the nature of the injury. Rarely does one size fit all.

Unlike the plaintiff in *Ahlborn* who was asked to repay a lien of $215,645.30 from a $550,000 recovery (39% of the recovery), plaintiff in *Lugo* was asked to repay $47,349.57 from $3,500,000 (a little more than 1%). It is hard to imagine that *Ahlborn* stands for the proposition that one who becomes a millionaire as the consequence of a malpractice settlement should be absolved, in whole or in part, from repaying a modest Medicaid lien and shortchanging the citizenry from an appropriate recoupment of taxpayer dollars.

Lastly, *Ahlborn* should not be used as a device to collaterally attack the reasonableness of an infant's settlement where a court has already signed an infant's compromise order approving the settlement. In short, if plaintiff's counsel believed that the settlement offer was inadequate, he should not have settled the case.

So ordered.

Dated: December 6, 2011

DOUGLAS E. MCKEON, J.S.C.