Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

----------	Index No. 15338/07
AGNES McDONALD,	
	Motion
Plaintiff,	Date August 3, 2010
-against-	Motion
	Cal. No. 15
SARA KOHANFARS and FARIBURZ KOHAN,	
Defendants.	Motion
----------	Sequence No. 3

PROCEDURAL BACKGROUND

Defendants Sara Kohanfars and Fariburz Kohan brought a motion seeking certain relief including, an order directing that a collateral source hearing be held to determine the amount of offset defendants are entitled to for payments from collateral sources. In a decision and order dated November 22, 2010, the court granted the motion to the extent of ordering that a collateral source hearing be held.

After a pre-hearing conference, in order to narrow the issues to be decided at the hearing, the court directed the parties to submit Memorandum identifying legal and factual issues that should be addressed at the collateral source hearing. In addition, plaintiff's healthcare provider, Verizon, a non-party to the action, was invited by the Court to submit an Amicus Brief.

This decision shall address the legal and factual issues raised by the parties in their submissions to the court.

RELEVANT FACTS

On January 20, 2005, Agnes McDonald was a passenger in a motor vehicle that was involved in an accident with defendants where she sustained serious personal injuries and required substantial healthcare and medical services thereafter. Prior to plaintiff's accident, plaintiff was a participant in the Verizon Medical Expense Plan for New York and New England Post

1986 Retiree Associates (hereinafter "Verizon Plan"). Verizon argues in its Amicus Brief that "[p]ursuant to the terms of the Plan, the Verizon Plan extended more than $90,000.00 in medical benefits on behalf of the Plaintiff for treatment of her accident related injuries. The benefits paid by the Verizon Plan on behalf of the Plaintiff were funded solely by assets of Verizon and/or a trust established on behalf of the Verizon Plan participants and beneficiaries. No portion of the benefits were funded through insurance."

The Verizon Plan covering the plaintiff contains a provision that provides:

> The subrogation and reimbursement provisions also mean that if you make a liability claim against a third party after you have received benefits from the medical plan or alternative choice plan, you must include the amount of those benefits as part of the damages you claim. If the claim proceeds to a settlement or judgment in your favor, you must reimburse the plan for benefits you received. You and your dependents must grant a lien to the medical plan or the alternative choice plan, and you and your dependents must assign to the plan any benefits received under any insurance policies or other coverages.

It is undisputed that by the terms of the Verizon Plan, Verizon provided medical benefits to plaintiff for certain medical costs and expenses. The costs of the medical benefits provided to plaintiff and paid for by Verizon is an amount not yet determined by the court.

On or about June 15, 2007, plaintiff commenced a civil action against defendants seeking to recover monetary damages for the personal injuries she sustained. On or about April 27, 2010, the matter proceeded to jury trial. Thereafter, the jury returned a verdict in favor of plaintiff and awarded a total of $700,000.00 in damages, including $90,000.00 for past medical expenses and $210,000.00 for future medical expenses. Post-trial motions by both parties followed, including defendants' instant motion to reduce the plaintiff's award for past and future medical expenses for past payments made, and future payments expected to be made by a collateral source.

CPLR 4545 states, in relevant part:

> In any action brought to recover damages for personal injury, injury to property or

> wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source . . ., except for life insurance . . .and those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits.

CPLR 4545 further states, in relevant part:

> In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict.

CPLR 4545, also known as the collateral source rule, provides that a plaintiff's award for damages may be reduced by the amount received from an outside source as long as the amount received from the outside source corresponds to a category of economic loss for which damages were awarded. In a personal

injury action, CPLR 4545(c) prohibits a plaintiff from recovering payments for past or future medical expenses reimbursed by their healthcare insurer. The statute abrogated the common-law rule that a plaintiff's recovery from a personal injury action would not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, like an insurance company. The main purpose of the statutory change was to prevent plaintiffs from receiving "windfalls and double recoveries for the same loss" (*Teichman v. Cmty. Hosp. Of Suffolk*, 87 NY2d 514, 521-22 [NY 1966]).

COLLATERAL SOURCE ESTABLISHED FOR PAST MEDICAL EXPENSES

It is undisputed that plaintiff is a retiree of Bell Atlantic, and is afforded healthcare coverage under the Verizon Medical Expense Plan for New York and New England Post-1986 Associate Retirees - Form K5C24 ("the Verizon Plan"). It is also undisputed that the Benefit Administrator under the Plan, BlueCross BlueShield, paid for all of plaintiff's medical treatment in connection with the injuries allegedly sustained in the subject accident up to the date of the verdict. Plaintiff testified to such at the trial. According to Verizon, pursuant to the Verizon Plan, Verizon has a lien against plaintiff's recovery for the past medical expenses paid on her behalf.

The Court finds that plaintiff's past medical expenses were replaced or indemnified by the Verizon Plan, which is a collateral source. Furthermore, while a jury's award for medical expenses that have been indemnified by a collateral source need not be reduced where there is "a statutory right of reimbursement" for the payment made on behalf of the injured party, no such statutory right of reimbursement exists in New York for private health insurers such as Verizon. Any such statutory relief is limited to government benefit providers such as Medicaid/Medicare and Workers' Compensation providers. The Court finds that there is no statute authorizing Verizon to seek reimbursement for payments made on plaintiff's behalf. Therefore, it is irrelevant that Verizon has asserted a lien against plaintiff's recovery for the past medical expenses paid on her behalf, or that the policy contains a subrogation and third-party reimbursement clause. Verizon's claim for reimbursement does not abrogate defendants' rights for set-off created by the collateral source rule under CPLR 4545.

REASONABLE CERTAINTY - FUTURE MEDICAL EXPENSES

Moreover, a defendant is entitled to a collateral source set-off if it meets a "reasonable certainty" standard of proof. The

reasonable certainty standard set forth in the statute has been interpreted by New York Courts as being synonymous with "highly probable" that the expenses will be indemnified by a collateral source (*see, Kihl v. Pfeffer*, 47 AD3d 154 [2d Dept 2007]). "The burden is on the party claiming the offset to prove its entitlement by clear and convincing evidence" (*Terranova v. New York City Transit Authority*, 49 AD3d 10, 19 [2d Dept 2007] [internal citations omitted]).

Defendants submit a copy of the Verizon Plan which contains a provision entitled "When participation ends" in the plan, which outlines the circumstances under which plaintiff is no longer eligible for healthcare coverage. Participation terminates only under very limited circumstances. Specifically, participation is terminated where plaintiff cancels coverage due to a change in her status, or where the policy is canceled based upon her failure to make a required payment of a premium. Participation for a retiree will also end where he/she is subsequently re-employed by Verizon, or an affiliate company, in a position that is other than occasional or supplemental; however healthcare coverage continues to be provided, the retiree is just insured under a different plan offered by the company. Based upon the undisputed submissions by the parties, the court finds the defendants have made a prima facie showing and that the jury's award for future medical expenses will, with reasonable certainty, continue to be indemnified by the Verizon Plan (*see, Terranova v. New York City Transit Authority*, 49 AD3d 10 [2d Dept 2007]). The burden now shifts to the plaintiff to establish that the medical expenses <u>will not</u> with reasonable certainty continue to be indemnified by plaintiff's healthcare plan, i.e., the Verizon Plan.

VERIZON'S CONTENTIONS

Verizon argues that the Verizon Plan creates a lien for repayment and a contractual obligation to plaintiff to reimburse the plan for benefits received. Verizon claims that it has either a lien or a contractual right of reimbursement against plaintiff, and/or a right of subrogation against the tortfeasor defendants, that entitles them to be repaid for the medical expenses it paid which was caused by the negligence of the defendants.

PLAINTIFF'S CONTENTIONS

Plaintiff argues that she fears and is concerned about Verizon seeking to recover medical expenses directly from plaintiff, notwithstanding that plaintiff has not received any

monies in pocket, and will not receive any monies for medical expenses because of the provisions of CPLR 4545. Plaintiff further argues that Verizon is not entitled to recover any reimbursements from plaintiff.[1] Under the principles of subrogation, since Verizon "stands in the shoes" of the beneficiary of the plan, i.e., the plaintiff, Verizon cannot sustain a recovery because under CPLR 4545(c) plaintiff could not recover for any medical expenses from the tortfeasor, as it has received a "collateral source" reimbursement therefor from Verizon.[2]

Plaintiff further argues that the Verizon Plan has not in the past and will not in the future pay for all of plaintiff's medical expenses. With respect to past medical expenses, the jury verdict has determined what amount that plaintiff is entitled to past medical expenses in excess of the $90,000.00 awarded by the jury. Therefore, plaintiff has no claim for additional past medical expenses, including any alleged out of pocket medical expenses that plaintiff paid that were not paid by the Verizon Plan. With respect to future medical expenses, to the extent that the plaintiff's healthcare plan only covers a

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[1] Although this issue is not ripe, as no party or non party has properly brought it before this Court for consideration, Verizon may be limited to reimbursement from only that portion of the judgment that is allocated as payment for medical expenses, and will not be able to reimbursed from the other portions of the judgment, intended to cover other items of damages, including pain and suffering. Plaintiff cannot be expected to pay its medical insurer for a recovery that did not include those damages. Additionally, plaintiff cannot be expected to pay its medical insurer from a recovery that did not include those damages (*see, e.g. Arkansas Dept. Of Health and Human Services v. Ahlborn*, 547 US 268, 126 S.Ct. 1752 [2006])[holding in case that involved interpretation of a federal Medicaid statute that an Arkansas law that required that Medicaid lien filed against a lawsuit recovery be paid in full prior to any other compensation for any other injuries that plaintiff may have incurred violated the federal Medicaid statute]).

[2]The court notes that Verizon has not made an application to this court for leave to assert its reimbursement claim either before or after the verdict in this action, nor has it commenced a separate action against defendants. Moreover, there is no evidence that Verizon has taken or attempted to take any legal action to recover directly from plaintiff any payments made under its healthcare plan.

portion of plaintiff's medical costs, the remaining uncovered medical expenses should be paid by defendants and such amounts are not subject to setoff by the collateral source rule. Plaintiff does have a claim against defendants for future medical expenses to the extent that future medical expenses are not fully paid for by plaintiff's healthcare plan, i.e., Verizon Plan, which amount is yet to be determined.

CONCLUSION

In conclusion, the Court finds that the jury's awards for past and future medical expenses must be reduced, that the only amounts due to the plaintiff are the cost of the premiums, the projected cost of maintaining those benefits during the eight-year period for which future medical expenses were awarded and the cost and/or projected cost for medical expenses that are not otherwise paid by plaintiff's healthcare plan during the eight-year period for which future medical expenses were awarded.

Accordingly, (1) the jury verdict of $90,000.00 for past medical expenses shall be reduced to an amount equal to the sum of the health insurance premium paid by plaintiff, if any, for the health insurance for the two-year period immediately preceding the accrual of this action up to April 27, 2010, the date of the jury verdict; and (2) the jury verdict of $210,000.00 for future medical expenses shall be reduced to an amount equal to the sum of the health insurance premium paid by plaintiff, if any, for the health insurance plus any out of pocket medical expenses paid by plaintiff or owed by plaintiff for medical services directly related to the injury caused by the defendants from the accident from the date verdict for a period not more than eight years from the date of the verdict.

IT IS HEREBY ORDERED that the plaintiff and defendants are directed to appear for a collateral source evidentiary hearing on Monday, April 16, 2012, 10:00 A.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York, to determine (1) the cost of the premiums, and the projected cost of maintaining those benefits during the eight-year period for which future medical expenses were awarded; (2)the cost for the health insurance premiums for the two year period immediately preceding the accrual of this action up to April 27, 2010, the date of the jury verdict, if any; (3) admissible proof that plaintiff's future medical expenses will, with reasonable certainty, NOT be replaced or indemnified in whole or in part by Verizon, plaintiff's current healthcare plan; (4) the amounts, if any, of plaintiff's future medical expenses from the date of the verdict for a period

not to exceed eight years from the date of verdict that are and will not be fully paid for by plaintiff's healthcare plan.

The plaintiff and defendants are directed to contact the clerk of Part 6 at (718) 298-1113 on Friday, April 13, 2012 to ascertain the availability of the court.

In lieu of having a hearing on any issue that the court has directed to be determined, the parties may submit a Stipulation of Facts upon which the parties do not dispute.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties and non-party Verizon.

Dated: March 21, 2012

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Howard G. Lane, J.S.C.