

<b>Commissioners of the State Ins. Fund v Gomez</b>
2017 NY Slip Op 30404(U)
February 28, 2017
Supreme Court, New York County
Docket Number: 450741/2016
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

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COMMISSIONERS OF THE STATE INSURANCE  
FUND,

Plaintiff,

DECISION/ORDER  
Index No. 450741/2016-----  
-against-MANUEL D. GOMEZ, ESQ., LAW OFFICE OF  
MANUEL D. GOMEZ, P.C., and WALTER MALCA,

Defendants.

-----X

HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action to recover a lien created pursuant to Workers' Compensation Law § 29 when the injured worker settled his third-party claim. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against defendants. For the reasons set forth below, plaintiff's motion is granted.

The relevant facts are as follows. On or about January 5, 2012, defendant Walter Malca ("Malca") was involved in an accident while in the course of his employment with non-party Central Park Studios Inc. He filed for workers' compensation benefits from Central Park Studios Inc., his employer. Plaintiff is Central Park Studios Inc.'s workers' compensation carrier. As of April 13, 2016, workers' compensation payments to Malca totaled \$7,548.87.

In May 2013, Malca commenced a third-party action in the Supreme Court, Kings County to recover damages for his personal injuries. On or about April 10, 2015, Malca settled and voluntarily discontinued his third-party action. Defendants did not notify plaintiff of the settlement offer or request plaintiff's consent to settle the third-party action. On or about January 4, 2016, plaintiff informed defendants Manuel

D. Gomez, Esq. and the Law Office of Manuel D. Gomez, P.C. of its workers' compensation lien.

Thereafter, on or about March 17, 2016, the Law Office of Manuel D. Gomez, P.C. informed plaintiff that the third-party action had been settled and the settlement check had been disbursed. Defendants have not paid plaintiff its workers' compensation lien. Thus, plaintiff commenced the instant action.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Pursuant to Workers' Compensation Law § 29(1), an employee may bring an action against a third party while receiving workers' compensation benefits. If the employee recovers in or settles the 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." *Kelly v. State Ins. Fund*, 60 N.Y.2d 131, 136 (1983). The carrier is also granted a "credit for any future benefits owed the claimant until the proceeds of the recovery are exhausted." *Williams v. Lloyd Gunther Elevator Service, Inc.*, 104 A.D.3d 1013, 1014 (3rd Dept 2013). The employee's attorney may be held liable for the workers' compensation lien where he disbursed the recovery proceeds without first satisfying the lien. *See Commissioners of State Ins. Fund v. Schell*, 23 A.D.2d 556 (1st Dept 1965). *See also Commissioners of State Ins. Fund v. Gyeltsen*, 2015 N.Y. Slip Op. 30164(U) (Sup Ct. NY County 2015).

In the present case, plaintiff has made a *prima facie* showing of its entitlement to summary judgment for a lien against the settlement proceeds. Plaintiff has established that it paid workers' compensation benefits on behalf of Malca through the affidavit of Daniel Becker ("Becker"), plaintiff's representative.

Further, plaintiff has established that Malca settled his third-party action and the proceeds were disbursed through the March 17, 2016 letter from the Law Office of Manuel D. Gomez, P.C. to plaintiff.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' argument that plaintiff's motion should be denied because it is brought in bad faith as Malca has offered to pay the lien in three installments is without merit. Defendants have not disputed that plaintiff is entitled to a lien nor that they have not paid plaintiff the amount of the lien.

Defendants' argument that the lien amount should be reduced by one-third to represent Malca's counsel's work in settling the case is also without merit. Pursuant to Workers' Compensation Law § 29(1),

Should the employee or his dependents secure a recovery from such other [third party], whether by judgment, settlement or otherwise, such employee or dependents may apply on notice to such lienor to the court in which the third party action was instituted, or to a court of competent jurisdiction if no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorneys' fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee or his dependents and the lienor.

*See also Matter of Stenson v. New York State Dept. of Transp.*, 84 A.D.3d 22, 25-26 (3rd Dept 2011). Here, defendants were required to apply for an order equitably apportioning expenditures, including attorneys' fees, in the Supreme Court, Kings County, the court in which the third-party action was instituted, rather than the Supreme Court, New York County.

Plaintiff has also established its entitlement to the cost of processing, handling and collecting the money owed by defendants pursuant to State Finance Law § 18(5). State Finance Law § 18(5) provides that a debtor who owes money to a state agency and fails to make payment of the debt within ninety days of receipt of notice that the debt is owed is liable for "an additional collection fee charge to cover the cost of processing, handling and collecting such debt, not to exceed twenty-two percent of the outstanding debt." Further, pursuant to State Finance Law § 18(5), "[t]he assessed collection fee charge may not exceed the agency's estimated cost of processing, handling and collecting such debt." In the present case, plaintiff has established its entitlement to its collection costs as plaintiff has shown that it is entitled to a lien on Malca's

recovery proceeds and that defendants have failed to satisfy the lien despite plaintiff's notice to Malca's counsel on January 4, 2016 that it had a lien on any recovery proceeds.

Accordingly, plaintiff's motion is granted. The Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$7,548.87, with interest thereon at the statutory rate from March 17, 2016. The portion of plaintiff's action seeking recovery of its collection costs in a sum not to exceed 22% of the outstanding debt pursuant to State Finance Law § 18 is severed and the issue of its collection costs in a sum not to exceed 22% of the outstanding debt that plaintiff may recover against the defendants is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

DATE:

2/28/17

  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.