

<b>Castlepoint Ins. Co. v Marder</b>
2017 NY Slip Op 30566(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 651165/2016
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

Index Number: 651165/2016

- against -

Sequence Number: 001

MARDER, ESKESEN & NASS; KENNETH MARDER,  
ESQ.; and LUNA GILMAR-GONZALEZ,

DECISION AND ORDER

Defendants.  
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Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on plaintiff's motion, pursuant to CPLR 3212, for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits . . . . .	1
Notice of Cross-Motion + Affirmation in Opposition - Exhibits . . . . .	2
Reply Affirmation - Affidavit . . . . .	3

**Background**

On or about February 6, 2008, defendant Luna Gilmar-Gonzalez ("Luna") was involved in an accident while in the course of, and within the scope of, his employment with non-party Kaff Kafe ("Kaff"). As a result, Luna allegedly sustained severe personal injuries. The accident was caused or brought about by the alleged negligence and/or fault of a third party. At all times relevant herein, plaintiff, Castlepoint Insurance Company ("Castlepoint"), provided Kaff with workers' compensation insurance coverage ("Policy").

Subsequent to the accident, Luna duly filed a notice of accident with the workers' compensation board. As the workers' compensation carrier for Kaff, Castlepoint made indemnity payments to or on behalf of Luna for lost wages and medical treatment in the sum of \$248,624.82. The workers' compensation claim was settled and closed via an agreement, fully executed November 20, 2012, with all workers' compensation payments ceasing as a result. Pursuant to New York State's Workers' Compensation Law ("WCL") § 29(1), when Luna accepted the carrier's compensation, Castlepoint now held a lien on "any" "third-party" action that Luna might commence arising from the same accident that gave rise to the workers' compensation claim.

Also subsequent to the accident, Luna retained defendant Kenneth Marder ("Marder"), and by extension his law firm, defendant Marder, Eskesen & Nass ("the Firm"; together with "Marder," collectively, "the Marder Defendants"), to represent him in a third-party action, Index No. 1556/2009, brought in Supreme Court, Kings County, to recover damages for the injuries he allegedly sustained in the accident ("Kings Action"). Defendants allege that the likelihood of success in the Kings Action seemed bleak and compromised by the likely finding of significant comparative fault on Luna's part. Marder alleges that he recommended to Luna that he accept the third party's \$375,000 settlement offer, as it represented significant funds to Luna in the face of dismissal, notwithstanding the fact that the true value of his damages was allegedly in the millions of dollars. Sometime prior to August 3, 2015, the Kings Action was settled for \$375,000 ("Settlement Agreement"). By letter dated May 13, 2015, Marder, on behalf of the Firm and Luna, notified Castlepoint of the Settlement Agreement. By letter dated

May 18, 2015 (“Consent Letter”), Castlepoint consented to the Settlement Agreement, subject to its lien, and apportioned the lien amount to \$164,306.95 (“Apportioned Lien”). The aforementioned letter also states, “Release of funds to [Luna] will constitute acceptance of the terms of this consent letter” (including, obviously, the Apportioned Lien).

Castlepoint alleges that seven months after the Settlement Agreement was reached, and after it inquired several times via telephone call to the Marder Defendants as to the status of the third-party action and the payment of the Apportioned Lien, and receiving no response, Castlepoint was forced to retain counsel to collect on the Apportioned Lien. The record reflects that by a February 18, 2016 letter from Dirk Marschhausen (“Dirk”), a partner at Marschhausen & Fitzpatrick, P.C. (“M&F”), Castlepoint’s counsel, to Marder, Castlepoint requested payment, plus interest, and informed defendants that if it were not paid its lien proceeds, a complaint would be filed seeking the entirety of the lien amount. Allegedly after several telephone conversations, Marder confirmed that the Kings Action was settled, and that he had distributed the settlement proceeds, almost nine months earlier, to the Firm and Luna, but was purposefully holding Castlepoint’s Apportioned Lien proceeds, in the sum of \$164,306.95, in escrow until Castlepoint agreed to reduce its lien.

On March 7, 2016, allegedly after being unable to convince the Marder Defendants to satisfy their fiduciary duties by making payment of the Apportioned Lien, M&F filed the instant action in this Court. Also on March 7, 2016, the Firm mailed Castlepoint a check in the sum of \$164,306.95. In an accompanying letter, Marder states to Dirk, in writing, that the Firm had been holding Castlepoint’s Apportioned Lien proceeds in escrow; Marder further requests Castlepoint to hold the Apportioned Lien proceeds in escrow pending some future litigation because “the lien claimed is excessive.” In a March 8, 2016 letter, Dirk rejects any obligation to hold the proceeds in escrow “pending some mythical motion.” In an April 14, 2016 letter Dirk states that Marder’s March 7, 2016 letter and check “is rejected and the payment is being returned because it is not ‘full payment’ of the claimed lien, as the lien with interest [is] now at least \$176,461.16.”

### **The Instant Action**

On March 7, 2016, Castlepoint commenced this action against defendants to recover its equitably apportioned workers’ compensation lien in the sum of \$164,306.95, plus interest from June 22, 2015, allegedly the date of the personal injury claim, plus costs and disbursements. Castlepoint asserts that all defendants breached the Policy, that the Marder Defendants breached their fiduciary duties, and that Luna violated WCL § 29(1).

Castlepoint now moves, pursuant to CPLR 3212, for summary judgment against defendants. In support of the motion, Castlepoint submits, inter alia: a payment history report, dated January 22, 2016, establishing it did indeed make the indemnity Settlement; Marder’s May 13, 2015 letter to Karen Welsh (“Karen”), a Subrogation Analyst for AmTrust North America, Castlepoint’s parent company, notifying Castlepoint of the Settlement Agreement; the Consent Letter, establishing Castlepoint’s consent to the Settlement Agreement; an e-courts “appearance detail” screenshot, dated April 12, 2016, indicating that as of August 3, 2015, the Kings Action “settled before trial”; Dirk’s February 18, 2016 letter to Marder, requesting payment of the Apportioned Lien; Marder’s March 7, 2016 letter to Dirk, with a \$164,306.95 check enclosed, requesting to renegotiate the Apportioned Lien; and Dirk’s April 14, 2016 letter to Marder, establishing Castlepoint’s rejection of the Firm’s check because it is not “full payment” of the claimed lien, which Castlepoint alleges is at least \$176,461.16 as of the date thereof. Marder cross-moves against Castlepoint, requesting an order directing that this matter be sent to a judge, hearing officer, or other neutral party to determine the full value of Luna’s injuries in the underlying action. Defendants submit: the agreement settling Luna’s workers’ compensation claim against Castlepoint; and photographs of Luna’s injuries.

### **Discussion**

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1<sup>st</sup> Dept 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”). The moving

party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Castlepoint is entitled to summary judgment on its breach of contract cause of action against defendants. WCL § 29(1) states that the "insurance carrier liable for the payment of such compensation ... shall have a lien on the proceeds of *any recovery* from such other, whether by judgment, *settlement* or otherwise ... and to such extent such recovery shall be deemed for the benefit of such ... carrier" (emphasis added). It is indisputable that a workers' compensation lien is inviolate and attaches to *any recovery*, up to the amount of the lien, by a workers' compensation claimant in a third-party action (with one exception not relevant here). See Stedman v City of New York, 107 AD2d 600, 601-02 (1<sup>st</sup> Dept 1985) ("Pursuant to [WCL § 29(1)], the lien of the Fund, as the workers' compensation carrier, attaches to the settlement proceeds of any action against the wrongdoer after deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting the recovery. This lien is inviolate [with one exception not relevant here]"). Thus, Castlepoint's right to its entire statutory lien, and certainly its Apportioned Lien, is full and unequivocal.

Furthermore, the Court finds that Castlepoint is entitled to interest on the Apportioned Lien, as the Kings Action was settled by August 2015. However, it is unclear to the Court the significance of June 22, 2015, the date from which Castlepoint requests interest. In the Court's opinion, the date on which Castlepoint is entitled to begin collecting interest is shortly after the Kings Action was settled. The record does not contain the Settlement Agreement to determine a date certain, but the Kings Action docket sheet establishes that the case settled by August 3, 2015. Assuming the tortfeasor in the Kings Action had 30 days to pay defendants the settlement proceeds, and defendants had 30 days to pay Castlepoint the Apportioned Lien, Castlepoint should have received payment by October 3, 2015. As such, the Court grants Castlepoint interest from October 3, 2015. See CPLR 5001(a) ("in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion"); see also CPLR 5001(b) ("interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date").

The Court has considered the parties' other arguments and finds them unavailing. In particular, defendants' argument that the value of Luna's injuries compared to his acceptance of a \$375,000 settlement in the face of "imminent dismissal" warrants a prorated reduction of Castlepoint's Apportioned Lien is without basis in law. On the contrary, the fact that Luna was faced with dismissal of the Kings Action due to his possible contributory negligence, and lack of liability on the part of third-party defendants, does not mean he should be entitled to a double recovery (*i.e.*, recovery of workers' compensation benefits *and* settlement proceeds from the Kings Action) at Castlepoint's expense. See WCL § 29(4) (insurance carrier "shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected"); see also Kirk v Central Hudson Gas & Elec. Co., 50 AD3d 1298, 1299 (3d Dept 2008) (WCL § 29(4) "clearly reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits ... A substantial part of the legislative purpose and intent of [WCL § 29(4)] is to prevent double recovery [by the claimant]"). In the instant action, defendants have obtained a settlement well in excess of Castlepoint's lien, allowing Luna to obtain not only a net recovery from the Settlement Agreement, but also to repay Castlepoint its equitably apportioned lien in full.

Having determined that defendants violated WCL § 29 by distributing the settlement funds to the Firm and Luna without paying Castlepoint its statutory lien, the Court need not reach a conclusion as to whether the Marder Defendants breached their fiduciary and legal duty to Castlepoint.

The Court hereby denies the Marder Defendants' cross-motion against Castlepoint. Defendants are not entitled to, essentially, another hearing to determine the full value of Luna's injuries in the Kings Action. The purpose of

commencing the underlying third-party action in the first place was to determine this very issue. Defendants herein voluntarily agreed to settle the Kings Action without first determining the full value of Luna's injuries and cannot now ask for such a determination. See Ianielli v North River Ins. Co., 119 AD2d 317, 321 (2d Dept 1986) ("Absent any indication whatsoever of [fraud, collusion, mistake or other factors as would undo a contract], the subject stipulation [of settlement], which was freely and voluntarily entered into in open court and which resulted in a signed general release is final and binding"). If defendants want an additional equitable apportionment of Castlepoint's lien, such a request must be made in the court in which the third-party action was instituted. See WCL § 29(1). Thus, Kings County, rather than New York County, is the proper venue for such a motion.

Accordingly, this Court grants Castlepoint summary judgment against defendants and denies the Marder Defendants' cross-motion against Castlepoint.

**Conclusion**

Motion granted; cross-motion denied. The clerk is hereby directed to enter summary judgment in favor of plaintiff, Castlepoint Insurance Company, and as against defendants Marder Eskesen & Nass, Kenneth Marder, Esq., and Luna Gilmar-Gonzalez, in the sum of \$164,306.95, plus statutory interest from October 3, 2015, plus costs and disbursements.

Dated: March 22, 2017

  
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Arthur F. Engoron, J.S.C.