

French v Schlavo

2010 NY Slip Op 33744(U)

November 16, 2010

Sup Ct, NY County

Docket Number: 100207-1998

Judge: George J. Silver

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

PRESENT: Hon. George J. Silver, Justice

PART 22

CAROLYN THOMAS FRENCH

INDEX NO. 100207-1998

vs.

MOTION DATE _____

ALFRED SCHIAVO and TECHNICAL MECHANICAL SERVICES, INC.

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

FOR THE

The following papers, numbered 1 to 2 were read on this motion to/for _____

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Notice of Cross-Motion — Affidavits — Exhibits	<u>2</u>
Answering Affidavits — Exhibits	_____
Replying Affidavits	_____

FILED

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NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby

In this action arising out of a motor vehicle accident, defendants Alfred L. Schiavo and Technical Mechanical Services, Inc. ("defendants") move by way of order to show cause for an order approving an annuity contract issued to plaintiff by Metropolitan Life Insurance Company pursuant to a CPLR article 50-B judgment; and directing plaintiff to provide defendants with a full satisfaction of judgment. Alternatively, defendants seek an order, pursuant to CPLR § 5021 [a] [2], declaring the judgment fully satisfied. Plaintiff Carolyn Thomas French ("plaintiff") cross-moves for various forms of relief. However, at oral argument on September 22, 2010, plaintiff withdrew the relief sought in her cross-motion. Accordingly, the court will treat plaintiff's cross-motion as opposition to defendants' order to show cause. The parties also stipulated at oral argument that the sole issue for the court to resolve is whether defendants, having tendered the lump sum payments and purchased the annuity contract as required by the judgment, are entitled to a full satisfaction of judgment.

A judgment resulting from plaintiff's underlying personal injury action was filed on March 16, 2010 and entered *nunc pro tunc* as of December 28, 2008. According to defendants, on March 25, 2010, defendants' insurer, CNA, issued three checks in the amount of \$4,154,747.07, payable to plaintiff and her attorneys, to satisfy the lump sum payments specified in the judgment. Plaintiff does not dispute defendants' contention that these checks were cashed.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Thereafter, CNA issued a check made payable to Metlife Tower Resources Group in the amount of \$2,190,406.16 to cover the purchase of the annuity contract required by the judgment. On April 14, 2010, the annuity contract was forwarded to plaintiff's attorney. Checks were tendered to plaintiff under the annuity contract but were not cashed because plaintiff objected to the annuity contract on the grounds that it did not comply with either the terms of the judgment or CPLR article 50-B. However, as noted above, plaintiff has withdrawn those objections. Plaintiff contends that under CPLR article 50-B, defendants will continue to be liable to plaintiff in the event of a default in the payment of the future periodic payments, making a full satisfaction of judgment inappropriate. Plaintiff also contends that a full satisfaction of judgment would leave her with no recourse against defendants should the owner of the annuity unilaterally change the payee designated on the contract. Defendants contend that they are entitled to full satisfaction of judgment, despite plaintiff's concerns, because article 50-B provides plaintiff with sufficient statutory protections.

As the Court of Appeals explained in *Rohring v City of Niagara Falls*, 84 NY2d 60, 638 NE2d 62, 614 NYS2d 714 [1994], CPLR article 50-B was enacted in 1986 as part of New York State's effort at tort reform (see, L 1986, ch 682, § 9). In its essential features it closely parallels CPLR article 50-A, which had been enacted a year earlier in response to concerns about the increasing size of verdicts in medical and dental malpractice actions (*see generally* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR art 50-A, at 711, and CPLR art 50-B, at 730-731). Though the statutory scheme of article 50-B is technical and complicated, its basic operation is easily stated. Past damages are paid in a lump sum (CPLR § 5041 [b]). Future damages, which are awarded by the jury without reduction to present value (CPLR § 4111 [f]), are bifurcated for purposes. The first \$ 250,000 is paid as a lump sum (CPLR § 5041 [b]). The remainder, after the subtraction of attorney's fees and other adjustments, is to be paid in periodic installments (CPLR 5041 [e]). To provide for these periodic payments, subdivision (e) further specifies that defendants are to purchase an annuity contract.

Since the structured award provision of article 50-B was explicitly based on the analogous 50-A provision, the legislative history of article 50-A is relevant here (*Schultz v Harrison Radiator Div. GMC*, 90 NY2d 311, 683 NE2d 307, 660 NYS2d 685 [1997]). The dual purpose behind article 50-A was to "moderate the cost of medical malpractice premiums, while assuring adequate and fair compensation for injured persons" (Governor's Program Mem, 1985 NY Legis Ann, at 132). By providing that injured parties receive future damage awards in periodic installments paid over time, the Legislature sought to guarantee plaintiffs "that compensation for future health care costs, lost earnings and other needs [would] be available to meet those expenses as they [arose]" (Governor's Program Mem, 1985 NY Legis Ann, at 132). At the same time, defendants would benefit because "paying a judgment in periodic installments reduces the overall cost of the judgment by permitting the insurer to retain and invest the balance of the award before the installments come due [and] additional savings [would] result from relieving the defendant from the obligation to make payments toward the plaintiff's future health care and other non-economic expenses in the event of the plaintiff's death" (*id.* at 132; *see also* CPLR §§ 5035 [a], 5045 [a]). "Although it is clear that the legislation was intended to address the concerns of defendants and to ensure the availability of liability insurance by providing for the structuring of judgments with respect to awards of future damages in excess of \$250,000, the Legislature was also cognizant of the need to provide adequate security for the payment of the periodic installments required by the judgments for the period of time over which such periodic payments were to be made. It did so by requiring defendants and their insurance carriers to purchase an annuity contract executed by a qualified insurer approved by the Superintendent of Insurance and to guarantee the payments thereunder. The Legislature also provided that, in the event payment was not made in a timely fashion, a plaintiff could apply to the court for an order

requiring payment of the outstanding payments in a lump sum without reduction to present value" (*Rohring v City of Niagara Falls*, 212 AD2d 320 [4th Dept 1995]).

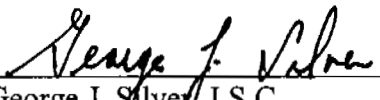
While it is clear from the legislative history that article 50-B was enacted primarily to benefit defendants, and their insurers, by moderating the costs of ever rising insurance premiums (*Stinton v Robin's Wood, Inc.*, 45 AD3d 203 [2d Dept 2007]), there is nothing the legislative history to indicate that, in exchange for this benefit, a defendant was to be burdened with a judgment for the extended period of years over which a plaintiff was entitled an award of future damages. Moreover, in the highly unlikely event that the owner of the instant annuity contract changes the payee, or there is a default in payments under the annuity contract, plaintiff's economic interests are more than adequately protected by the provisions of CPLR §§ 5043 and 5044 (*Allison v Erie County Indus. Dev. Agency*, 2007 NY Slip Op 27207 [Sup Ct, Erie County]). Therefore, as defendants have shown that the required lump sum payments were made to plaintiff and that an annuity contract was purchased, defendants have established that all of the judgment has been satisfied (*Malik v Noe*, 54 AD3d 733 [2d Dept 2008]). Accordingly, it is hereby

ORDERED that defendants' order to show cause is granted to the extent that, pursuant to CPLR § 5021 [a] [2], the Clerk of the Court is directed to make an entry of the full satisfaction on the docket of the judgment; and it is further

ORDERED that plaintiff's cross-motion is denied as moot; and it is further

ORDERED that defendants are to serve a copy of this order, with notice of entry, upon plaintiff within thirty days of entry.

Dated: November 16, 2010
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER

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