

Ronkese v Tilcon N.Y., Inc.

2013 NY Slip Op 34152(U)

December 31, 2013

Supreme Court, Ulster County

Docket Number: 07-4137

Judge: Christopher E. Cahill

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT
RICHARD RONKESE,**

ULSTER COUNTY

Plaintiff,

-against-

**Decision & Order
Index No.: 07-4137**

**TILCON NEW YORK, INC., BUCHANAN
MARINE, INC., HELMSMAN MANAGEMENT
SERVICES, INC., Individually, and d/b/a
OLD CASTLE, OLD CASTLE, and TILCON
MINERALS, INC.,**

**FILED
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**Nina Postupack
Ulster County Clerk**

Defendants.

Supreme Court, Ulster County
Motion Return Date: July 8, 2013
RJI No. 55-08-00323

Present: Christopher E. Cahill, JSC

Appearances:

The Law Offices of Melley Platania, PLLC
Attorneys for Plaintiff
24 Closs Drive
Rhinebeck, New York 12572
By: Steven M. Melley, Esq.

Cook, Netter, Cloonan, Kurtz & Murphy, PC
Co-Counsel for defendant Tilcon
PO Box 3939
Kingston, New York 12402
By: Eric M. Kurtz, Esq.

Traub, Lieberman, et al.
Attorneys for Non-Party Indemnity Insurance
Company of North America
Mid-Westchester Executive Park
Seven Skyline Drive
Hawthorne, New York 10532
By: Eric D. Suben, Esq.

Brown, Gavalas & Fromm, LLP
Attorneys for Non-Party Chartis Marine
355 Lexington Avenue
New York, New York 10017
By: Robert J. Brown, Esq.

Cahill, J.:

By Order to Show Cause dated January 10, 2013, plaintiff moves to enforce a stipulation of settlement dated October 15, 2012 entered into by the plaintiff and his employer, defendant Tilcon, to settle plaintiff's Jones Act (46 USC 688) claim against Tilcon. Tilcon opposes the motion.

Initially, the Court concludes that to the extent the Order to Show Cause seeks to compel Chartis Marine Adjusters and Indemnity Insurance Company of North America ("ACE") to fully comply with the terms of the stipulation of settlement, it must be denied for the reasons stated in the opposing submissions of ACE's attorney, Mr. Suben, and of Chartis Marine Adjusters' attorney, Mr. Brown. As these attorneys argue in their respective submissions, their clients were not parties to either the action or the stipulation, and the plaintiff has not commenced an action against them. Therefore, both subject matter jurisdiction and personal jurisdiction are lacking.

Next addressing the stipulation of settlement between plaintiff and Tilcon, this Court concludes, after reviewing the parties' submissions, that plaintiff's attorneys' request for relief must be judged by what was known and undisputed by the parties as

they placed the stipulation of settlement on the record on October 15, 2012. What is known and undisputed is the following: first, plaintiff was an employee of Tilcon at the time of his injury and, therefore, the threshold issue at trial was whether plaintiff, as a Tilcon employee, was also a “seaman” as defined under the Jones Act. Second, as there was no third-party tortfeasor involved in the case, the only other cause of action which survived defendant’s pre-trial summary judgment motion was his cause of action for gross negligence against Tilcon as his employer if the Jones Act claim failed; the other defendants had been stipulated out of the case at the close of discovery. Third, to the date of the stipulation of settlement, plaintiff had been paid Worker’s Compensation benefits, as an employee of Tilcon, in the sum of \$264,630.47.

Based on the foregoing, defendant is correct that Kelly (60 NY2d 131) should not apply because the underlying facts do not meet the litigation model contemplated by Worker’s Compensation Law § 29, giving rise to Kelly benefits, i.e., a Worker’s Compensation lien which is subsequently satisfied from the proceeds of the plaintiff employee’s recovery from a third-party tortfeasor. The fly in the ointment, however, is the fact that the documentation (plaintiff’s Exhibit C) plaintiff’s attorneys received from Liberty Mutual prior to trial indicated that there was a Worker’s Compensation lien in the sum of \$264,630.47 (while the document, an undated letter, identifies the insured as Old Castle, it is apparently beyond dispute that Old Castle is a corporate affiliate of Tilcon). Indeed, defendant Tilcon acknowledged as much in the stipulation, and further agreed to

pay Kelly benefits, "if any." Relying on these representations, plaintiff's attorneys believed that they were settling the case for \$3,250,000.00 and their contingent fee, according to their retainer agreement, was calculated on this sum. They also believed that they would be receiving their Kelly share once the lien was satisfied.

The net result of defendant's post-settlement assertion is that there is no lien as Tilcon is self-insured. In economic reality, plaintiff's attorneys believed that they obtained a recovery not of \$3,250,000.00 alone, but of this sum together with the \$264,630.47 in Worker's Compensation for which Tilcon is apparently not asserting any right of recovery. Now, because of this representation by Tilcon's Worker's Compensation carrier--a representation upon which trial counsel, Mr. Kurtz, justifiably relied--plaintiff's attorneys lost the opportunity to calculate their contingent fee on the recovery. This Court agrees. Based upon the stipulation entered into before the Court, this Court finds that plaintiff's attorneys are entitled to recover from Tilcon the difference between their fee calculated on \$3,250,000.00 and their fee calculated on \$3,514,630.47. This shall be paid within 45 days, with interest thereon from October 15, 2012, or plaintiff's attorney's shall have judgment against Tilcon New York, Inc. for same.

This shall constitute the decision and order of the Court. The original decision and order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the

applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
December 31, 2013

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Nina Postupack
Ulster County Clerk

ENTER



CHRISTOPHER E. CAHILL, JSC

Papers considered: Order to Show Cause dated January 10, 2013, Melley Affirmation dated January 8, 2013 with annexed exhibits A-K; Suben Opposition/Affirmation dated January 24, 2013 with annexed exhibits A-B; Brown Affirmation in Opposition dated February 5, 2013 with exhibit 1; Kurtz Affidavit in Opposition dated February 6, 2013; Karpousis Opposing Affirmation dated February 26, 2013 and Toolan Opposing Affirmation dated February 6, 2013; Melley Reply Affirmation/Memorandum dated February 14, 2013 with annexed exhibits A-B and Melley Supplemental Memorandum (undated) with annexed exhibits A-B.