

Matter of Hardowar v National Interstate Ins. Co.

2013 NY Slip Op 33329(U)

August 5, 2013

Sup Ct, Queens County

Docket Number: 700592/2013

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

8/6/13

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

----- X

In the Matter of the Application of
RAMESH HARDOWAR, Petitioner, seeking
approval and confirmation of the
settlement of a claim nunc pro tunc,

Petitioner,

- against -

NATIONAL INTERSTATE INSURANCE COMPANY,

Respondent.

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Index No.: 700592/13

Motion Date: 05/21/13

Motion No.: 58

Motion Seq.: 1

FILED
AUG -8 2013
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 10 were read on this petition
for an order:

Papers
Numbered

- Order to Show Cause-Notice of Petition.....1 - 5
- Respondent's Affirmation in Opposition.....6 - 10

Petitioner commenced this petition for an order pursuant to
New York Workers' Compensation Law, approving and confirming the
settlement of the claim filed on his behalf against Luis I.
Noval.

In his affidavit in support of the petition, Ramesh Hardowar
states that on March 7, 2012, he sustained injuries when the
vehicle owned and operated by Luis I. Noval struck his vehicle in
the rear while Hardowar's vehicle was stopped at a red traffic
signal at the intersection of Woodhaven Boulevard and Penelope
Avenue in Queens County. At the time of the collision petitioner
was driving a truck in the course of his employment with Metro
Fuel Oil Company. In November 2012 he was advised by his counsel,
Scott Baron & Associates, that an offer to settle the matter for

\$30,000 had been made. He states that he accepted the settlement with the knowledge that 1/3 would be paid out of the gross amount for counsel fees, leaving him with a balance of \$19,993.33 as his share of the proceeds. He states that the respondent, National Interstate Insurance Company, was the workers' compensation insurance carrier for petitioner's employer, Metro Fuel Oil Corp. Prior to accepting the settlement, National Interstate provided workers compensation benefits to the petitioner in the amount of \$15,360.88.

On November 20, 2012 and November 29, 2012 petitioner's counsel sent a letter to National Interstate advising that Hardowar had been offered \$30,000 to settle his claim and seeking written consent from respondent to settle the claim and a statement from National that no lien would be asserted against the settlement proceeds on account of workers' compensation benefits that had been paid.

On December 12, 2012, National Interstate responded by stating that the workers' compensation benefits were paid in lieu of no-fault benefits pursuant to Insurance Law § 5102(b) and therefore they were closing their file. On December 13, 2012, petitioner's counsel requested that Interstate sign a letter expressly stating that it was not asserting a lien against the settlement proceeds. However, rather than signing such a document, Interstate responded that because National provided workers' compensation benefits to Hardowar in lieu of first party or no fault benefits, pursuant to Workers Compensation Law § 29(1)(a) National does not possess a lien on any settlement proceeds and does not have to consent to a settlements of Hardowar's third-party personal injury action. Petitioner now brings the instant action pursuant to Workers' Compensation Law § 29(5) seeking judicial approval of the settlement because National has failed to sign a consent to the settlement and a waiver of its lien as required by WCL § 29(5). Citing Johnson v Buffalo & Erie County Private Indus. Council, 84 NY2d 13 [1994], counsel asserts that WCL 29(5) requires either that the insurance carrier signs a consent or a petitioner must obtain a compromise order from the court to settle a third-party action.

Petitioner also submits an affidavit from Dr. Montaz Majeed, petitioner's treating physician, who states that the petitioner sustained disc bulges of the lumbar spine in connection with the accident and that despite physical therapy he is still feeling significant pain in his lower back and neck which pain is causally related to the accident of March 7, 2012.

In opposition to the petition, Counsel, for National Interstate contends that pursuant to Insurance Law § 5102(b) National was required to provide workers' compensation benefits in lieu of no fault benefits to Hardowar. As such, counsel asserts it informed petitioner's counsel by letter dated December 13, 2012, that National does not have a lien on any settlement proceeds pursuant to Workers' Compensation Law § 29(1)(a) and, as such, National asserts it does not have to consent to the settlement. Respondent asserts that since the petitioner is not permanently or partially disabled, has recovered from his injuries, and is no longer seeking further medical treatment or lost wages, and has returned to his employment with Metro Fuel Oil, that all the benefits he received were in lieu of first party benefits. Further, counsel asserts that pursuant to Workers' Compensation Law § 29(1)(a), National would only have a lien on the settlement if the compensation benefits provided by National exceeded \$50,000.

Upon review and consideration of the petition and the respondent's affirmation in opposition thereto, this court finds that the petition is granted and the settlement between petitioner and third-party, Luis I. Noval, is approved.

Pursuant to Workers' Compensation Law § 29, a workers' compensation carrier has a lien on any recovery of damages arising out of the underlying accident except as to "first party benefits" which another insurer would have otherwise been obligated to pay under New York's no-fault insurance law. Thus the workers' compensation carrier does not possess a lien on proceeds paid to an insured which another insurer would have otherwise been obligated to pay under the No-Fault Law. First party benefits are those paid for basic economic loss or up to \$50,000 per person for certain medical and other reasonable and necessary expenses as well as lost earnings for three years from the date of the accident (see Matter of Johnson v Buffalo & Erie County Private Indus. Council, 84 NY2d 13 [1994]).

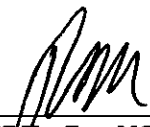
A claimant who settles a third-party action for less than the compensation benefits paid or payable under the Workers' Compensation Law must obtain the written consent of the workers' compensation carrier or obtain an order on notice from the court within three months of the settlement, approving it. The Court of Appeals has held that such written consent is required even if the carrier does not have a lien on the settlement proceeds (see Brisson v County of Onondaga, 6 NY 3d 273 [2006]). A court may order nunc pro tunc approval of such a settlement after more than three months have passed if the petitioner can establish that "(1) the amount of the settlement is reasonable, (2) the

delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and (3) the carrier was not prejudiced by the delay." Medina v Phillips, 88 AD3d 524 [1st Dept 2011]; Kouadio v Hereford Ins. Co., 2012 NY Slip Op 30632(U) [Sup Crt. NY County 2012]).

Here, this Court finds that the delay in obtaining approval was not attributable to the fault or neglect of petitioner, the amount of the settlement is reasonable based upon the injuries set forth by the plaintiff's physician, and National Interstate suffered no prejudice as a result of the short delay.

Accordingly, for all of the above stated reasons, the petitioner's application for judicial approval of the settlement nunc pro tunc is granted and National Interstate Insurance Company shall not have a lien on the proceeds of the recovery.

Dated: August 5, 2013
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.