

<b>Jin Yu Liu v Hermitage Ins. Co.</b>
2017 NY Slip Op 31320(U)
June 16, 2017
Supreme Court, New York County
Docket Number: 157589/2016
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

JIN YU LIU,

Petitioner,

Index No.: 157589/2016  
**DECISION/ORDER**  
Motion Sequence No. 001

-against-

HERMITAGE INSURANCE COMPANY,  
AMTRUST NORTH AMERICA INC.

Respondents.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing the petition.

<b>Papers</b>	<b>Numbered</b>
Notice of Petition .....	1
Respondents' Affirmation in Opposition.....	2

*Napoli Bern Ripka Shkolnik, LLP*, New York (Joseph P. Napoli of counsel), for petitioner.  
*Marschhausen & Fitzpatrick, P.C.*, New York (Dirk Marschhausen of counsel), for respondents.

Gerald Lebovits, J.

Petitioner, Jin Yu Liu, commenced this proceeding against respondents Hermitage Insurance Company and Amtrust North America Inc. (collectively Amtrust) for an order granting petitioner nunc pro tunc consent to settle his third-party claim under Workers' Compensation Law § 29 (5) in lieu of granting consent by the Workers' Compensation carrier and lienholder, Amtrust.

Background

In November 2013, petitioner, an employee of Yummy House — insured by Amtrust — was injured while riding his bicycle when he was struck by a car owned and operated by Andrew Gross. (Notice of Petition, at ¶¶ 2, 10.) Because of this work-related accident, petitioner suffered injuries to his head, brain, left shoulder, left hand, neck, and back; petitioner also had to have emergency craniotomy surgery. (Notice of Petition, at ¶¶ 10, 26.) In 2014, petitioner retained the then-existing law firm of Napoli Bern Ripka Shkolnik, LLP (Napoli), to pursue his third-party claim against Gross for this accident and retained the law firm of Pasternack Tilker Ziegler Walsh Stanton & Romano (Pasternack) to pursue his workers' compensation claim.

In April 2014, petitioner, through his counsel Pasternack, received a Notice of Pre-Hearing Conference/Hearing. The notice informed petitioner that the employer/carrier (Yummy House/Amtrust) had objected to his claim for workers' compensation benefits. (Notice of Pre-

Hearing Conference, Petition Exhibit C). According to the Notice, because the employer/carrier objected to the claim, petitioner was not receiving any benefits. The Pre-Hearing Conference was scheduled for May 8, 2014. By May 8, 2014, petitioner had not received any workers' compensation benefits.

On May 15, 2014, petitioner, through his counsel Napoli, reached a pre-lawsuit settlement with Gross in the amount of \$25,000. (Petition, at ¶ 12.) Gross was insured with Utica National Insurance of Texas with a policy limit of "\$25,000/\$50,000." (Petition Exhibit D.) The pre-lawsuit settlement amount represents the full amount of available liability coverage for this accident under Gross' insurance. (Petition, at ¶ 12; Petition, Exhibit D.) Petitioner did not obtain Amtrust's consent to settle his third-party claim.

On June 9, 2014, at the Workers' Compensation hearing, the Workers' Compensation Law Judge, Donald Gill, awarded petitioner workers' compensation benefits. Petitioner continued to receive benefits for more than two years before seeking to compromise his workers' compensation claim before the Workers' Compensation Board (the Board); petitioner was required to advise the Board of the status of his third-party action against Gross. Because petitioner settled his third-party claim without obtaining Amtrust's consent, petitioner's workers' compensation benefits were suspended on September 22, 2016. (Affirmation in Opposition, ¶¶ 6-7.) Petitioner brings the instant petition under Workers' Compensation Law § 29 (5) seeking nunc pro tunc consent of his settlement of his third-party claim against Gross.

#### Discussion

A petitioner's failure to obtain consent from a respondent before settling a third-party claim or to obtain judicial approval within three months of the settlement may bar petitioner from receiving future workers' compensation benefits. (*See* Workers' Compensation Law § 29 [5].) But a petitioner who seeks judicial approval after the three-month period may obtain from a court nunc pro tunc consent to the settlement:

"A judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even where the application for approval is sought more than three months after the date of settlement, provided that the employee 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 employee's fault or neglect, and (3) the insurance carrier was not prejudiced by the delay." (*Jackson v City of New York*, 70 AD3d 694, 695 [2d Dept 2010].)

A court has the discretion to grant nunc pro tunc consent. (*Lindberg v Ross*, 105 AD3d 1186, 1187 [3d Dept 2013].) In New York, "the reason for the delay, rather than its length, determines the timeliness of a motion for a nunc pro tunc compromise." (*Jackson v City of New York*, 2009 NY Slip Op 50108 [U], \*4, 2009 WL 159710, at \*2 [Sup Ct, Kings County 2009] [citations omitted], *affd* 70 AD3d 694, 695 [2d Dept 2010].)

Under Workers' Compensation Law § 29 (5), an application to compromise and settle a third-party claim must contain the following papers: a petition, an affidavit from an attorney, and an affidavit from one or more physicians.

Section 29 (5) also provides that the physician's affidavit must contain the following information:

"[the physician's] connection with the case; the period covered by the treatment and the nature, duration and extent of the injuries; the date of [the physician's] last examination and the condition of the employee at that time; whether . . . the employee is still suffering any disability or inconvenience as a result of the injury, giving the details thereof; whether . . . the accident has left the employee with any permanent disability, defect, scar or impairment; the cost of the treatment and whether . . . he expects to be paid or has been paid by the defendant or by anyone acting on the defendant's behalf. Where the affidavit as to the present condition is not made by the attending physician, the latter's affidavit setting forth the character of the injuries and treatment should also be attached, or the failure to obtain it explained. Where the employee was confined to a hospital, the court may require the production of hospital records."

Petitioner has not attached to his petition any affidavit from his physician as required under Workers' Compensation Law § 29 (5). Although petitioner submits his hospital medical records, he does not submit an affidavit from his physician providing information about his future treatment and prognosis, the duration and extent of his disability, the total amount of time lost, and whether he was unable to work because of the accident. (See Workers' Compensation Law § 29 [5].) Also, plaintiff does not explain why he failed to obtain an affidavit from his physician. According to the petition, petitioner had emergency craniotomy surgery. (Notice of Petition, at ¶ 26.)

Petitioner states that "[g]iven the seriousness of his injury, and the fact that \$25,000 was the maximum recovery under defendant's policy, the amount [of the settlement] is reasonable." (Petition, at ¶ 26.) Without an affidavit from a physician, the court cannot determine the reasonableness of petitioner's settlement with Gross for \$25,000.

Given the procedural deficiencies in the petition, the court exercises its discretion and denies the petition.

The court need not address whether petitioner's delay in applying for a judicial order was not caused by petitioner's fault or neglect. (See *Jackson*, 70 AD3d at 695.) Also, the court need not address whether defendant was not prejudiced by the delay. (*Id.*)

Accordingly, it is hereby

NYSCEF DOC. NO. 27

RECEIVED NYSCEF: 06/20/2017

ORDERED and ADJUDGED that petitioner's verified petition is denied; and it is further

ORDERED that respondent serve a copy of this decision and order with notice of entry on petitioner and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: June 16, 2017



J.S.C.  
**HON. GERALD LEBOVITS**  
J.S.C.