

Beityakov v 5377 Kings Hwy. Partners, LP
2017 NY Slip Op 32584(U)
November 27, 2017
Supreme Court, Kings County
Docket Number: 501053/15
Judge: Ellen M. Spodek
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At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of November, 2017.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.

-----X

SARAH BEITYAKOV,
Plaintiff,

- against -

5377 KINGS HIGHWAY PARTNERS, L.P.,
Defendant.

-----X

DECISION AND ORDER

Index #501053/15

Mot. Seq. #2

The following e-filed papers read herein:

NYSCEF#

Order to Show Cause and Supporting Affirmations (Affidavits) Annexed _____	<u>17-24</u>
Affirmation in Opposition and Exhibits Annexed _____	<u>26-36</u>
Reply Affirmation _____	<u>38</u>

In this action to recover damages for personal injuries, plaintiff Sarah Beityakov (plaintiff) moves, pursuant to Workers' Compensation Law (WCL) § 29 (5), for judicial approval of the compromise of this action nunc pro tunc. Republic Franklin Insurance Company, c/o Utica National Insurance Group, the workers' compensation carrier for plaintiff's employer (the carrier), opposes the motion.

Background

On February 5, 2013, plaintiff tripped and fell at her place of employment, sustaining several long-lasting injuries. Her claim for workers' compensation benefits

was granted upon a finding that she sustained those injuries during the course of her employment.

Plaintiff thereafter commenced this action against the premises owner, defendant 5377 Kings Highway Partners, LLC (defendant), seeking to recover for the same injuries. Approximately 22 months after she commenced this action, she settled it with defendant for the sum of fifty six thousand dollars (\$56,000), with the net recovery to her of thirty-six thousand twenty four dollars (\$36,024). The carrier did not consent to the settlement. At the time of the settlement, the carrier's outstanding workers' compensation lien was thirty-seven thousand three hundred eighty one dollars and nine cents (\$37,381.09), subject to a directive from the workers' compensation board to continue payments for plaintiff's ongoing medical care and treatment. Eleven months after entering into the settlement, plaintiff moved, pursuant to WCL 29 (5), for judicial approval of the compromise of this action nunc pro tunc.

Discussion

Pursuant to WCL 29 (5), "an employee may settle a lawsuit arising out of the same incident as . . . her Workers' Compensation claim for less than the amount of compensation . . . she has received only if the employee has obtained either written consent to the settlement from the compensation carrier, or judicial approval within three months after the case has been settled" (*Russo v New Hampshire Ins. Co.*, 133 AD3d 860, 861 [2d Dept 2015]). "The failure to obtain either the insurance carrier's consent or court approval will bar the employee from receiving further Workers' Compensation benefits"

(*Matter of Williams v Orange & Sullivan Excavating Corp.*, 114 AD3d 802, 803 [2d Dept 2014]).

“However, 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” (*Matter of Williams*, 114 AD3d at 803).

Considering (1) that the eleven-month delay in seeking judicial approval was due to plaintiff’s own fault or neglect, (2) the lack of any reasonable explanation for the delay, (3) the lack of any explanation, by way of a medical affidavit, as to why the settlement amount is reasonable, and (4) the prejudice to the rights of the carrier resulting from the settlement, the Court denies plaintiff’s motion (*see Lobban v Brown*, 125 AD3d 612, 614 [2d Dept 2015]; *Furtado v Mario’s Bakery*, 17 AD3d 527, 528 [2d Dept 2005]; *Singh v Ross*, 12 AD3d 498, 499 [2d Dept 2004]; *Matter of Hermance v Fireman’s Fund Ins. Co.*, 265 AD2d 328 [2d Dept 1999]; *Hanosh v Diaz*, 253 AD2d 850, 852 [2d Dept 1998]). Plaintiff’s claim that she was unaware of a workers’ compensation case at the time that this case was settled is unavailing. Plaintiff herself retained the attorneys for both this lawsuit and for the workers compensation case. Ignorance is not an excuse. Plaintiff herself knew that she had a worker’s compensation case at the same time as this

lawsuit, was receiving payments, and neglected to tell her attorneys for this lawsuit about the worker's compensation case. She cannot now excuse that "neglect" to get around the fact that the worker's compensation carrier did not consent to the settlement of this lawsuit and is now attempting to get judicial approval nunc pro tunc. Plaintiff clearly fails to satisfy her burden of proving that the delay in applying for the judicial order of approval was not caused by her fault or neglect.

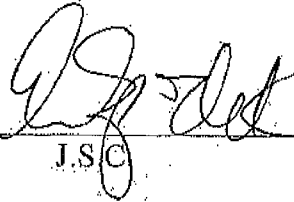
Conclusion

Accordingly, it is

ORDERED that plaintiff's motion is denied.

This constitutes the Decision and Order of the Court.

E N T E R,



J.S.C.