SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

- v -

DANIEL WEIR, SACKS & SACKS, LLP, PETER DIABO, TURNER CONSTRUCTION COMPANY, LIBERTY MUTUAL INSURANCE COMPANY

Defendant.

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INDEX NO. 451946/2019

MOTION DATE 11/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Commissioners of the State Insurance Fund (NYSIF) move for an order, pursuant to CPLR 3212, granting it summary judgment on its complaint against defendants Daniel Weir, Esq. (Weir) and Sacks & Sacks, LLP (Sacks & Sacks) (together, Law Firm Defendants): (1) in the amount of $198,189.62 plus interest at the statutory rate of nine percent (9 %) since February 9, 2017; and (2) awarding it, pursuant to New York State Finance Law § 18(5), 22 percent (22%) of $198,189.62, or the amount of $43,601.72, for reasonable costs of processing, handling, and collecting money owed by defendants; and (3) pursuant to CPLR 3211, dismissing all counterclaims asserted by the Law Firm Defendants for lack of subject matter jurisdiction, lack of standing, and the claims are barred by the settlement agreement and release of February 9, 2017. Law

Firm Defendants cross-move for an order, pursuant to CPLR 3212, dismissing the complaint as a matter of law, and, pursuant to CPLR 3011, compelling NYSIF to answer the counterclaims.

Plaintiff commenced this action to recover on a lien created pursuant to Workers' Compensation Law § 29 when the injured worker, defendant Peter Diabo (Diabo), settled his third-party claim against defendant Turner Construction Company (Turner) and its liability insurer, defendant Liberty Mutual Insurance Company.

BACKGROUND

The following are the relevant facts based on the pleadings and submissions on this motion and cross motion. On February 14, 2012, defendant Diabo was involved in an accident at a construction site, during and within the scope of his employment with Empire City Iron Works, sustaining personal injuries (NYSCEF Doc. No. 12, amended complaint, ¶ 13). Diabo asserted that the accident was caused or brought about by the negligence of Turner (*id.*, ¶ 14). Diabo filed for workers' compensation benefits from Empire City Iron Works, which had a workers' compensation insurance policy issued by NYSIF (*id.*, ¶ 15; see NYSCEF Doc. No. 20, affidavit of Daniel Becker, dated April 4, 2020 [Becker aff], ¶ 6). Sometime after the accident, Diabo filed a notice of accident with the Workers' Compensation Board (WCB) and NYSIF.

In 2013, Diabo retained the Law Firm Defendants to file a third-party action, pursuant to Workers' Compensation Law § 29(1), on Diabo's behalf against Turner, as the general contractor at the construction site, in the Supreme Court, New York County, Index No. 151783/2013 (NYSCEF Doc. No. 14, answer to amended complaint, ¶ 31).

On July 14, 2014, the WCB awarded Diabo $54,416.38 from NYSIF for medical expenses and lost wages (*id.*, ¶ 34). In August 2014, NYSIF filed an application for WCB review (the Appeal), which held the prior award in abeyance (*id.*, ¶ 36).

On May 13, 2015, Turner's attorneys, London and Fischer, obtained a lien letter from NYSIF stating that the "State Insurance Fund, as workers' compensation insurer of the claimant's [Diabo's] employer, has paid $0.00 in workers' compensation and $0.00 in medical benefits to and on behalf of the claimant" (NYSCEF Doc. No. 42). The letter further provided that "in order to protect the claimant's right to receive all future workers' compensation and medical benefits to which he or she may be entitled, the written consent of [NYSIF] to any settlement or other disposition of the lawsuit must be obtained" (*id.*).

In December 2016, Diabo and the Law Firm Defendants reached a tentative settlement of the third-party action with Turner (NYSCEF Doc. No. 14, answer to amended compl, ¶ 45). On December 8, 2016, Law Firm Defendants notified Diabo's workers' compensation attorney, Joseph Romano, that they had settled Diabo's third-party action against Turner, and asked that Romano withdraw or terminate the Appeal before the WCB (NYSCEF Doc. No. 46).

On February 9, 2017, Diabo, Law Firm Defendants, and Turner signed a settlement agreement, settling the third-party action for $335,000.00 (Settlement Agreement) (NYSCEF Doc. No. 25). In this Settlement Agreement, NYSIF is identified as a "Releasee," and Diabo and the Law Firm Defendants agreed that "any Workers' Compensation Claim, resulting from or arising out of the Releasors' alleged injuries,

claims or lawsuit are Releasors' responsibility to pay." (*id.*, settlement agreement § 2.3). The Law Firm Defendants also represented that they would "hold the settlement funds in an escrow account or client trust account without distributing the funds to Releasors or any other persons until all liens (including . . . Workers' Compensation liens) arising from [this matter] have been satisfied" (*id.*, settlement agreement § 2.7). Diabo also agreed to "terminate any claim for Workers' Compensation benefits and discontinue any pending claims" (*id.*, settlement agreement § 3.1). The Law Firm Defendants did not notify NYSIF of the Settlement Agreement or request NYSIF's consent to it (NYSCEF Doc. No. 20, Becker aff, ¶ 11).

Diabo's workers' compensation attorney did not terminate the pending appeal, and, on March 29, 2017, the WCB ruled in Diabo's favor, awarding him, workers' compensation benefits from NYSIF for lost wages and medical expenses incurred as a result of the accident, which NYSIF then paid to Diabo, in the amount of $155,412.92. This award represented compensation accrued during the pendency of Diabo's claim (NYSCEF Doc. No. 14, answer to amended compl, ¶ 50; NYSCEF Doc. No. 20, Becker aff, ¶ 12). NYSIF then continued to make workers' compensation payments to Diabo (NYSCEF Doc. No. 20, Becker aff, ¶ 12).

The next day, on March 30, 2017, the Law Firm Defendants received the settlement checks from Turner (NYSCEF Doc. No. 28), and, on May 9, 2017, filed a stipulation of discontinuance of the third-party action (NYSCEF Doc. No. 29). By letter dated May 25, 2017, the Law Firm Defendants distributed $135,000.00 of the settlement proceeds in payment of Diabo's Iron Workers Local 40 Union medical benefits lien for

his medical expenses up to that date (NYSCEF Doc. No. 47). Diabo's union was paying his medical expenses, because NYSIF was challenging his workers' compensation coverage before the WCB. The Law Firm Defendants also distributed the balance of the settlement funds of $88,333.33 to Diabo (NYSCEF Doc. No. 50). They did not make any payment to NYSIF.

In August 2017, and, again, on December 8, 2017, NYSIF requested another hearing before the WCB to suspend benefits because "third party case settled without consent from SIF see C-8 of 3/30/2017" (NYSCEF Doc. Nos. 48, 49).

On February 4, 2019, NYSIF issued a lien letter to the Law Firm Defendants in the amounts of $192,312.45 in workers' compensation paid to Diabo, and $7,673.77 in medical benefits paid on behalf of Diabo, for a total amount of $198,189.62 (NYSCEF Doc. No. 53). The Law Firm Defendants have not paid NYSIF its workers' compensation lien. This action and these motions ensued.

NYSIF seeks to recover its lien, submitting the affidavit of Daniel Becker, the Third-Party Division Head of its Legal Division, who attests that NYSIF paid $198,189.62 in workers' compensation benefits to Diabo, submitting NYSIF's payment history (Payment History). In this Payment History, there are payments listed under "medical" dating back to 2012, and under compensation directly to Diabo, there are payments to him dating back to 2013 and extending to 12/08/17, as well as payments to his workers' compensation attorney, Joseph Romano, in the total amount of $8,800.00 (NYSCEF Doc. No. 27). NYSIF also submits evidentiary proof that Diabo and the Law

Firm Defendants settled Diabo's third-party action, and the proceeds were distributed in May 2017, but that NYSIF's lien was not paid.

With respect to the Law Firm Defendants' four counterclaims, NYSIF seeks dismissal on several grounds. It asserts that they involve issues within the exclusive jurisdiction of the WCB, and that defendants lack standing to assert them because the claims relating to the payment of Diabo's medical expenses belong to Diabo, not his counsel. It also challenges each counterclaim for failing to state a claim.

In opposition, the Law Firm Defendants contend that NYSIF's failure to issue a lien letter until nearly two years after the settlement funds for the third-party action had been paid must result in dismissal of its complaint, citing *Aetna Cas. & Sur. Co. v National Grange Mut. Ins. Co.*, 44 Misc 2d 540 (Albany City Ct 1964). They contend that NYSIF was aware that the third-party action had settled, but allowed Diabo's hospital bills, which exceeded $200,000.00, to be paid solely by Diabo, even though the WCB decision awarded him medical expenses and wages from NYSIF. At the least, they assert that there are factual issues as to when NYSIF had notice of the settlement, and why Mr. Becker, who may have had knowledge of the settlement before March 30, 2017, never issued a lien letter placing them on notice that NYSIF had paid monies to Diabo after the case settled. They further urge that Mr. Becker does not explain how he became aware of the settlement in December 2017, or why he waited until February 2019 before issuing a lien letter. The Law Firm Defendants maintain that NYSIF was under a fiduciary duty to notify them that it made a $155,412.00 payment to Diabo on March 29, 2017. They assert that NYSIF is attempting

to use Workers' Compensation Law § 29 to circumvent its statutory obligation to pay for all medical costs associated with a worker's injury, and unjustly enrich itself. There is no affidavit from Diabo.

The Law Firm Defendants assert four counterclaims in their answer: unjust enrichment, fraud, conspiracy to commit unjust enrichment and conspiracy to defraud (NYSCEF Doc. No. 14). In their opposition to NYSIF's motion, they urge that their counterclaims of fraud, unjust enrichment, and "breach of good faith and fair dealing" are outside the province of the WCB. As to standing, they assert that their property is being affected since NYSIF is attempting to recover over $240,000.00 from them.

DISCUSSION

The plaintiff's motion for summary judgment on the complaint is granted as to liability, and the counterclaims are dismissed. The defendants' cross motion is denied.

Motion and Cross Motion for Summary Judgment on Complaint

On a summary judgment motion, the movant bears the burden of presenting prima facie proof demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant makes such a showing, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion should not be granted where

there is any doubt as to the existence of a disputed material issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

Workers' Compensation Law § 29(1) governs the rights and obligations of employees and their employers' compensation carriers regarding actions arising from injuries caused by third-party tortfeasors (*see Burns v Varriale*, 9 NY3d 207, 213 [2007]). It "reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits" (*Matter of Beth V. v New York State Off. of Children & Family Servs.*, 22 NY3d 80, 91 [2013] [internal quotation marks and citation omitted] [emphasis omitted]; *see Carcione v Essex Homes of WNY, Inc.*, 179 AD3d 1519, 1520 [4th Dept 2020]). Thus, its purpose is to avoid a double recovery by an injured employee by giving the compensation carrier a lien against the proceeds of the employee's recovery obtained in the third-party action (*Commissioners of the State Ins. Fund v Gyeltsen*, 2015 NY Slip Op 30164[U] at * 2 [Sup Ct, NY County 2015]).

At the time of settlement of the third-party action, the lien, in the amount of the past compensation the carrier has paid with interest, attaches to the net proceeds (*see Matter of Nunes v National Union Fire Ins. Co.*, 272 AD2d 401, 402 [2d Dept 2000]). The carrier is also given a "credit for any future benefits owed the claimant until the proceeds of the recovery are exhausted" (*Matter of Williams v Lloyd Gunther El. Serv., Inc.*, 104 AD3d 1013, 1014 [3d Dept 2013], citing WCL §§ 29[1], [4]). "The lien, however, is subordinate to a deduction for costs and attorney's fees" incurred by the claimant (*Matter of Kelly v State Ins. Fund*, 60 NY2d 131, 136 [1983]). If the employee

or his or her dependents obtains a recovery from the third party, by settlement or judgment or otherwise, they may apply, on notice to the carrier lienor, "'to the court in which the [tort] action was instituted, or to a court of competent jurisdiction if no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery'" (*id*. at 136-137, quoting WCL § 29[1]). Those "expenditures shall be equitably apportioned by the court between the employee or his [or her] dependents and the lienor" (*id.* at 137 [internal quotation marks and citation omitted]; *see Rahman v Busby*, 62 Misc 3d 366, 372 [Sup Ct, Bronx County 2018]).

The lien is enforceable against anyone in possession, custody or control of the settlement proceeds (*see Commissioners of State Ins. Fund v Schell*, 23 AD2d 556, 556 [1st Dept 1965]; *New Hampshire Ins. Co. v Krentsel & Guzman, LLP*, 2020 NY Slip Op 31575[U] [Sup Ct, NY County April 28, 2020]). The employee's counsel may be held liable for the lien where it disbursed the settlement proceeds without first satisfying the lien (*see Commissioners of State Ins. Fund v Schell*, 23 AD2d at 556; *Commissioners of State Ins. Fund v Crown*, 65 Misc 2d 593, 594 [Sup Ct, App Term, 1st Dept 1970]; *Commissioners of State Ins. Fund v Gomez*, 2017 NY Slip Op 30404[U] at * 3 [Sup Ct, NY County March 1, 2017]; *see also Commissioners of State Ins. Fund v Allstate Ins. Co.*, 41 Misc 2d 189, 189-90 [Civ Ct, NY County 1963], *affd* 42 Misc 2d 141 [Sup Ct, App Term, 1st Dept 1963]).

Here, plaintiff NYSIF has made a prima facie showing of its entitlement to summary judgment of liability for a lien against the settlement proceeds. NYSIF has

established that it paid workers' compensation benefits to Diabo through the affidavit of Mr. Becker, NYSIF's representative. Moreover, it established that Diabo, through the Law Firm Defendants, settled the third-party action against Turner, and that the proceeds were distributed by the Law Firm Defendants as follows: $135,000.00 to satisfy the Iron Workers' Local 40 Union medical benefit lien, and $88,333.33 to Diabo.

The gravamen of the Law Firm Defendants' opposition and their cross motion is that they were not on notice of the lien because NYSIF failed to send a lien letter before the settlement. However, as the court recently held in *New Hampshire Ins. Co. v Krentsel & Guzman, LLP* (2020 NY Slip Op 31575[U] at * 3), "the statute [WCL § 29(1)] makes no mention of any notice requirement" (*see Commissioners of State Ins. Fund v Garcia*, 49 Misc 3d 875, 878-880 [Sup Ct, Suffolk County 2015]; *see also Lumbermen's Mut. Cas. Co. v United Traction Co.*, 59 Misc 2d 1096, 1096 [Albany County Court 1969] ["[o]n its face the law [WCL § 29] does not require that any notice be given"]; *Commissioners of State Ins. Fund v Sims*, 187 Misc 815, 815-816 [Sup Ct, Albany County 1946]). The lien automatically attaches upon the carrier's payments. Thus, the failure to send a lien letter does not bar NYSIF's claim (*New Hampshire Ins. Co. v Krentsel & Guzman, LLP*, 2020 NY Slip Op 31575[U] at * 2).

The only caselaw the Law Firm Defendants cite in support of their argument is *Aetna Cas. & Sur. Co. v National Grange Mut. Ins. Co.*, 44 Misc 2d 540, an Albany City Court case that is nonbinding and not persuasive. In addition, in that case, the court specifically found that the defendant's insurance carrier settled the case "in good faith without notice of any pending lien" (*id. at* 541). Here, in contrast, the Law Firm

Defendants cannot reasonably argue they were unaware of NYSIF's potential lien. Defendant Diabo does not, by affidavit or otherwise, dispute that he received the monies from NYSIF. The Law Firm Defendants clearly were aware of the WCB award in Diabo's favor and NYSIF's pending appeal, and while they asked Diabo to have his workers' compensation attorney end the WCB appeal, they failed to check that such appeal had actually been terminated. In addition, they clearly represented in the Settlement Agreement that they would satisfy the workers' compensation lien (NYSCEF Doc. No. 25, settlement agreement, §§ 2.3 and 2.7), demonstrating that they had notice of at least the possibility of a lien. The Law Firm Defendants fail to raise a triable issue as to liability on NYSIF's lien (*see Commissioners of State Ins. Fund v Garcia*, 49 Misc 3d at 879).

With respect to the amount of the lien, however, there are triable issues. NYSIF's submission of its Payment History fails to establish the amount it seeks. First, the "Medical Claim Payments Data" includes items not clearly defined as medical, such as "Public Goods PO," "Admiral Reporting," "Claude Odom $77.00 transaction fee," "Veronica Munoz $159.50 transcript," and included a 9-21-17 payment to defendant Peter Diabo of $1,572.96, which appears to be compensation not a medical payment, and may already be included in the compensation payment history (NYSCEF Doc. No. 27). Second, the "Compensation Claim Payment Data" on the same Payment History document calculates to $183,512.45 in compensation payments to defendant Diabo, but NYSIF seeks the amount of $192,312.45 for compensation (plus $5,877.17 for medical=$198,189.62). Moreover, NYSIF apparently adds in three payments

to Diabo's workers' compensation attorney, Joseph A. Romano, in the total amount of $8,800.00 without any explanation (*id.*). The Payment History also includes some medical and compensation payments that were made prior to the WCB Appeal award, which would have already been included in that award. None of this Payment History is explained in Becker's affidavit (see NYSCEF Doc. No. 20).

The Law Firm Defendants' argument that there is a factual issue regarding the date of NYSIF's knowledge of the settlement, addresses the amount NYSIF may recoup after its payment of the WCB appeal award. At the time of settlement, NYSIF had a lien which attached for the amounts it paid, and it is given a credit for future benefits owed Diabo until the proceeds of the settlement are exhausted (*see Matter of Williams v Lloyd Gunther El. Serv.*, 104 AD3d at 1014). If NYSIF was aware of the settlement on August 8, 2017, when it appealed again to the WCB (see NYSCEF Doc. No. 48), but continued to pay Diabo without pursuing a suspension of payments from the WCB, that could affect the date up to which it is entitled to recover its compensation payment from Law Firm Defendants and Diabo. Therefore, the court finds fact issues as to the amount due, which will be referred to a Special Referee to hear and report, or, if the parties agree, to hear and determine the appropriate amount of the lien. The Law Firm Defendants' cross motion to extinguish NYSIF's workers' compensation lien is granted only to the extent that the issue of the amount of the lien will be referred as discussed above.

NYSIF also has established its entitlement to the cost of processing, handling, and collecting the money owed by the Law Firm Defendants pursuant to State Finance Law § 18(5). Section 18(5) provides that a debtor who owes money to a state agency, like

NYSIF, and fails to pay that debt within 90 days of receipt of notice of that debt "is liable for 'an additional collection fee charge to cover the cost of processing, handling and collecting such debt, not to exceed twenty-two percent of the outstanding debt'" (*Commissioners of State Ins. Fund v Gomez*, 2017 NY Slip Op 30404[U] at * 3, quoting State Finance Law § 18[5]). The collection fee "may not exceed the agency's estimated cost of processing, handling and collecting such debt" (State Finance Law § 18[5]).

In this case, NYSIF has established its entitlement to its collection costs as it has shown that it is entitled to a lien on Diabo's settlement proceeds and that the Law Firm Defendants and Diabo have failed to satisfy the lien. The issue of the actual amount of NYSIF's collection costs pursuant to State Finance Law § 18(5) is severed, in part because the amount of the outstanding debt is in issue. Moreover, NYSIF's proof on this issue was conclusory. Mr. Becker only states that he hired a law firm on a one third contingency basis. Thus, the issue of NYSIF's collection costs also is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine the issues (*see Commissioners of State Ins. Fund v Gomez*, 2017 NY Slip Op 30404[U] at ** 4).

Motion to Dismiss Counterclaims, Cross Motion to Compel Answer to Counterclaims

The Law Firm Defendants' counterclaims are dismissed. Each of the four counterclaims are premised on the same theory, that NYSIF has been unjustly enriched and committed fraud by failing to give notice of its lien and seeking to recover medical costs it paid Diabo from the settlement proceeds. First, as discussed above, notice of the lien was not required by the statute, and not only did the Law Firm Defendants know that

NYSIF would have a lien, they recognized the lien, and their responsibility to satisfy it from the proceeds, in the Settlement Agreement. Second, the difficulty with their assertions in the first counterclaim that NYSIF unjustly benefited from Diabo's payment of the Iron Workers' Local 40 Union medical benefit lien is that NYSIF paid Diabo's medical costs directly to Diabo in its $155,412.92 payment on March 29, 2017, so it is not clear there was any unjust enrichment (see NYSCEF Doc. No. 22, answer to amended compl, ¶¶ 25-82).

In addition, the Law Firm Defendants are challenging NYSIF's actions in retaining the benefit of being relieved of paying the medical bills, but Workers' Compensation Law § 29 enables it to retain this benefit by giving it the ability to recover the amounts paid by the third-party tortfeasor. Moreover, the issue of whether NYSIF as a workers' compensation carrier was obligated to pay medical benefits to Diabo or directly to the Iron Workers' Local 40 Union is within the exclusive jurisdiction of the WCB, and it would be inappropriate for this court to determine this issue when the matter of his benefits was already before the WCB (*see Botwinick v Ogden*, 59 NY2d 909, 911 [1983]; *Melo v Jewish Bd. of Family & Children's Servs.*, 282 AD2d 440, 441 [2d Dept 2001]; *see also Matter of American Home Assur. v New York Cent. Mut. Fire Ins. Co.*, 2010 NY Slip Op 30280[U] [Sup Ct, NY County 2010]).

The second counterclaim for fraud is insufficient as a matter of law. It fails to set forth with detail NYSIF's intentional misrepresentations, or if based on omission-- NYSIF's failure to issue a lien letter-- it fails to set forth NYSIF's duty to disclose. "'The elements of a cause of action for fraud require a material misrepresentation of a fact,

knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages'" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 310 [2017] quoting *Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]). Also, to state a fraud claim, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]).

Here, the Law Firm Defendants do not allege, with sufficient particularity, details demonstrating that NYSIF engaged in any fraud. Their allegations concerning NYSIF's alleged omission and bad faith refusal to issue a lien letter are purely conclusory in nature and do not set forth the basis for a duty to disclose (*see Carlson v American Intl. Group, Inc.*, 30 NY3d at 310). Moreover, the claim alleges that NYSIF concealed from the Law Firm Defendants the benefit payments it made to Diabo. Diabo, however, was the Law Firm Defendants' client, and they clearly could and should have asked their own client if he received any payments from NYSIF, before distributing all the settlement proceeds to him. Further, they were aware that Diabo had an award from WCB and that it had been appealed by NYSIF, and while they asked his workers' compensation attorney to discontinue it, they failed to follow up on that request. They also had an obligation under WCL § 29 to seek NYSIF's consent before settlement. Thus, they cannot assert justifiable reliance. Their fraud counterclaim is insufficient as a matter of law.

The third and fourth counterclaims asserting civil conspiracy to commit unjust enrichment and fraud, respectively, are dismissed. It is well-established that a "mere conspiracy to commit a [tort] is never of itself a cause of action" (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986] [internal quotation marks and citation

omitted]; *see Carlson v American Intl. Group, Inc.*, 30 NY3d at 310). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d at 969). Defendants' argument that they assert a breach of the duty of good faith claim is unavailing. The counterclaims do not allege such a claim, and these defendants fail to plead any basis for NYSIF's duty to them. Since all four counterclaims are dismissed, the cross motion seeking to compel an answer to the counterclaims is denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted as to liability only as against defendants Daniel Weir, Esq. and Sacks & Sacks, LLP; and it is further

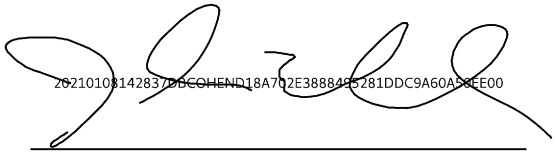
ORDERED that the issue of the amount of plaintiff's workers' compensation lien, and the amount of collection costs pursuant to State Finance Law § 18(5) incurred by plaintiff and awarded as against defendants Daniel Weir, Esq. and Sacks & Sacks, LLP, is referred to a Special Referee to hear and report with recommendations, except that, in the event, and upon the filing, of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues; and it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1] upon the Special Referee Clerk in the General Clerk's Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that the branch of the motion to dismiss the counterclaims is granted and the counterclaims are dismissed; and it is further

ORDERED that the cross motion is denied.



1/8/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE