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**STATE OF VERMONT
WINDHAM COUNTY**

**WINDHAM SUPERIOR COURT
DOCKET NO. 407-9-06 Wmcv**

**DOMINIC M. PULITANO,
Plaintiff,**

v.

**THAYER STREET ASSOCIATES, INC.,
BRIAN MCGUIRE, CASTLE HILL
CONSTRUCTION CORP., MARTEN
HOEKSTRA, VALERIE HOEKSTRA,
JOHN REDD, and ALLEN JACKSON,
Defendants.**

**ORDER GRANTING TRAVELERS INSURANCE COMPANY / HARTFORD
UNDERWRITERS INSURANCE'S MOTION TO INTERVENE**

Introduction

Travelers Insurance Company / Hartford Underwriters Insurance (“Travelers”) moves to intervene in this action arising from a claimed workplace injury, arguing that Plaintiff Dominic Pulitano has not reimbursed Travelers’ workers’ compensation lien, despite receiving settlement funds in excess of the lien amount. Travelers is represented by Wesley M. Lawrence, Esq. Plaintiff is represented by Timothy A. O’Meara, Esq.

Plaintiff was injured at work in 2005, and recovered worker’s compensation benefits from his employer’s insurance carrier, Travelers. Upon paying benefits to Plaintiff, Travelers acquired a lien pursuant to 21 V.S.A. § 624(e), applicable against any recovery Plaintiff might obtain from third party tortfeasors. In 2006, Plaintiff brought this action against the above-captioned third party Defendants, whom he alleged were liable for his injuries. In 2008, after pretrial discovery and litigation, Plaintiff entered into settlement negotiations with Defendants. During negotiations, Attorney O’Meara

communicated with Candace Sheehan, a subrogation agent employed with Travelers, regarding a possible compromise of Travelers' \$215,494.29 lien, representing the sum of all worker's compensation benefits paid to Plaintiff on account of his injury. On August 29, 2008, Ms. Sheehan stated in an email that Travelers would accept \$75,000 in full discharge of Travelers' reimbursement rights; which agreement, according to Travelers, was based on Attorney O'Meara's representation that Plaintiff could only hope to obtain \$300,000 in a settlement with Defendants. On October 13, 2008, following additional negotiations with Defendants, Plaintiff settled for an amount substantially greater than \$300,000. Thereafter, Plaintiff tendered to Travelers \$75,000 in "full satisfaction" of its lien.

On November 19, 2008, Travelers filed a Notice and Application for Hearing with the Vermont Department of Labor, seeking an Order compelling Plaintiff to satisfy Travelers' \$215,494.29 lien. On April 21, 2009, the Department ruled that it lacked jurisdiction, reasoning that it had already approved "a Form 15 full and final settlement agreement" on Plaintiff's workers' compensation claim in July of 2006.

Notwithstanding the apparent payment of settlement proceeds to Plaintiff, no stipulation of dismissal was filed with the Court, prompting an inquiry from the Clerk on January 6, 2009. Attorney O'Meara responded by letter dated January 14, 2009, representing that the case was "indeed settled", yet acknowledging that disputes over distribution of the proceeds remained a bar to dismissal, including Travelers' refusal "to honor its agreement to accept \$75,000 in full satisfaction of its lien in this matter." Nevertheless, Attorney O'Meara now characterizes the procedural posture by his sur-

reply to Travelers' Motion to Intervene: "This litigation is no longer 'pending' as releases have been signed and the settlement proceeds have been disbursed."

On April 29, 2009, Travelers filed the presently pending Motion to Intervene, asserting that Plaintiff settled with Defendants for an amount sufficient to satisfy Travelers' \$215,494.29 lien, yet has not done so. By its motion, Travelers seeks standing in this action to enforce its statutory lien against the proceeds of the settlement

In response, Plaintiff argues that Travelers' Motion is untimely; and that Travelers accepted \$75,000 in full satisfaction of its lien, as evidenced by Attorney O'Meara's correspondence with Travelers.

Based on the following discussion, Travelers' Motion to Intervene is **GRANTED**.

Discussion

V.R.C.P. 24(a) reads as follows:

[u]pon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The timeliness of an application to intervene is a matter within the discretion of the trial court. *Ernst v. Rocky Road, Inc.*, 141 Vt. 637, 639 (1982) (citing 7A Wright & Miller, Federal Practice and Procedure § 1916). In the case of an intervention of right, which Travelers has by virtue of 21 V.S.A. § 624(a), the court must consider the totality of the circumstances, including such factors as: (1) the power to have sought intervention at an earlier stage in the case; (2) the case's progress; (3) harm to the plaintiffs; and (4) the availability of other means to join the case. *Ernst*, 141 Vt. at 639. Courts should be reluctant to dismiss a request to intervene as of right as "untimely" where the would-be

intervenor may be seriously harmed if intervention is denied. 7C Wright, Miller & Kane, Federal Practice and Procedure, Civil § 1916.

Travelers argues that its Motion is timely, as it had no reason to intervene prior to the discovery of a settlement in excess of that on which it's offer of compromise was based, and because of Plaintiff's subsequent refusal to satisfy its \$215,494.29 lien. The Court agrees.

Pursuant to 21 V.S.A. § 624(e), when an injured employee recovers damages against third party defendants, the workers' compensation insurance carrier is entitled to reimbursement against Plaintiff's recovery. 21 V.S.A. § 624(e). Section 624(e) provides:

[a]ny recovery against the third party for damages resulting from personal injuries . . . after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery

Nothing in section 624, either expressly or implicitly, requires an insurance carrier to join a lawsuit against third party tortfeasors to protect its interests. See 21 V.S.A. § 624. Instead, as Travelers argues, the insurance carriers' rights vest the moment the worker recovers settlement funds. 21 V.S.A. § 624(e). Furthermore, the statutory scheme plainly contemplates judicial approval of settlements, 21 V.S.A. § 624(f), which has never been sought here. See, also, *Progressive Cas. Ins. Co. v. Estate of Keenan*, 182 Vt. 298 (2007) (declaratory judgment action initiated by carrier for third-party defendant to resolve dispute as to extent of workers compensation lien).

Here, Travelers moves to intervene to challenge Plaintiff's assertion that he had authority to enter into the eventual settlement by representing that Travelers would compromise its lien for \$75,000 in full discharge of its reimbursement rights. The events

underlying that dispute only arose during Plaintiff's protracted settlement negotiations with Defendants. Since Travelers was under no obligation to intervene earlier to protect its interests guaranteed by statute, Plaintiff offers no persuasive authority for the argument that, having failed to seek earlier intervention, Travelers should be deemed barred from seeking to enforce its lien over the disputed settlement proceeds.¹

Plaintiff argues, however, that the undisputed record shows that Travelers agreed to accept \$75,000 in full satisfaction of its lien, and that communications between Travelers and Plaintiff indicate that there was a binding contract between them. Yet, Travelers responds that its agent, Ms. Sheehan, agreed to accept \$75,000 pursuant to Attorney O'Meara's representation that Plaintiff could only recover \$300,000 in a settlement. Travelers maintains that Attorney O'Meara misrepresented the total amount he expected to recover from Defendants in a settlement in order to obtain a drastic reduction in the workers compensation lien. Travelers denies that the exchange of e-mails establishes any binding commitment to compromise its lien for \$75,000. Rather, it insists that the e-mail record must be read, at best, as making any commitment by Travelers contingent on a settlement of no more than \$300,000. In Travelers' view, Attorney O'Meara exceeded his authority in representing during the final settlement negotiations that it would compromise its lien for a mere \$75,000, because he knew he had obtained that commitment on the assumption of a much lower settlement amount than the one eventually reached. See *Negyessy v. Strong*, 136 Vt. 193, 194 (1978) (where

¹ Plaintiff's argument that he will face "catastrophic" tax consequences if forced to disgorge funds from a structured settlement annuity is unavailing. Indeed, at the heart of the dispute framed by Traveler's motion and complaint is whether any settlement funds should have been disbursed without a proper accounting for the full extent of its lien. Assuming the absence of a valid agreement to compromise Travelers' lien, the Court cannot properly spare Plaintiff from the consequences of investment decisions regarding funds to which he had no entitlement.

a party was induced to enter into a contract by misrepresentation, “the deceived party may seek the remedy of being excused from the contract through rescission . . .”).

While Attorney O’Meara denies making misrepresentations, and asserts that Travelers’ failure to actively participate in negotiations accounts for any misunderstandings on its part, the Court concludes that the dispute over Plaintiff’s and Travelers’ intentions cannot be resolved on the current record. Rather, a judicial determination of the proper distribution of the settlement proceeds will require an evidentiary hearing. Indeed, it would appear unavoidable that Attorney O’Meara will be an essential witness in such proceedings, raising ethical concerns as to Plaintiff’s need for either substitute or stand-by counsel.

Based on the foregoing, it is hereby **ORDERED**:

Travelers’ Motion to Intervene is **GRANTED**. The Court will set the matter for further evidentiary hearing on the extent of Travelers’ lien, and the proper distribution of the settlement proceeds. In advance of such evidentiary hearing, the Clerk shall schedule a status conference as soon as the docket allows, in order that the Court may hear representations from the parties as to the likely scope of the hearing and the amount of time necessary to present evidence.

DATED _____, at Newfane, Vermont.

John P. Wesley
Presiding Judge