

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32
Justice

	x	Index	
HEREFORD INSURANCE COMPANY		Number <u>15958</u>	2007
- against -		Motion	
		Date <u>March 20,</u>	2008
JUSTICE PAITOU, et al.		Motion	
	x	Cal. Number <u>3</u>	
		Motion Seq. No. <u>3</u>	

The following papers numbered 1 to 2 read on this motion by plaintiff Hereford Insurance Company for an order granting leave to reargue or renew defendants Rosillo & Licata's prior motion to dismiss the complaint, and upon reargument or renewal, denying the motion to dismiss.

	<u>Papers Numbered</u>
<u>Notice of Motion-Affirmation-Exhibits</u>	1
<u>Opposing Affirmation.....</u>	2

Upon the foregoing papers, this motion is determined as follows:

This Court's order of June 27, 2008, is recalled and the following is substituted in its place:

The Court's records reveal that defendant Rosillo & Licata, P.C. (sued herein as Rosillo & Licata) originally moved on October 29, 2007, to dismiss the complaint and that the motion was adjourned to November 8, 2007, at which time the motion was granted as plaintiff's counsel stated that he had no opposition to the motion to dismiss. Clearly, there was a misunderstanding as to the status of said motion, as the parties had entered into a stipulation dated November 7, 2007, whereby they adjourned said motion on consent until December 3, 2007, and agreed that plaintiff's opposition papers were to be received by opposing

counsel on or before November 19, 2007, and the defendant's reply was to be served on or before November 30, 2007. Although the stipulation was filed with the court on November 8, 2007, pursuant to the parties' agreement, the court was unaware of the stipulation at the time the motion calendar was called.

In view of the fact that the court was not timely apprised of the parties' November 7, 2007 stipulation, and as it is preferable to determine the motion to dismiss on the merits, the order of November 8, 2007, is hereby vacated, and the prior motion shall now be determined on the merits.

Defendant Rosillo & Licata, in its prior motion seeks an order dismissing the complaint on the grounds of documentary evidence and failure to state a cause of action, pursuant to CPLR 3211(a)(1) and (7).

On December 7, 2003, Justice Paitou (or Paitoo) was in the process of removing an item from the trunk of his vehicle when he was struck by a motor vehicle operated by Bakary Sow. Mr. Paitou sustained serious injuries, including the amputation of his right leg.

Defendant Rosillo & Licata, P.C. was retained by Mr. Paitou with respect to his claim for personal injuries against Mr. Sow's insurer, American Transit Insurance Company ("American Transit"). The court notes that although plaintiff in its complaint alleges that the accident occurred on December 9, 2003, the documentary evidence submitted herein indicates that the accident occurred on December 7, 2003. The court also notes that the documentary evidence submitted herein identifies the injured individual as Justice Paitoo. However, for the purposes of this motion the court will use the spelling of Paitou as set forth in the complaint and the affidavit of Mr. Licata.

Joseph Licata, Jr., states in his affidavit that Mr. Paitou informed him that he was self-employed and not working in the course of his employment at the time of the accident, and that his client so "affirmed" his employment status in his application for No-Fault benefits. Mr. Licata states that during the time Mr. Paitou's claim against Mr. Sow's insurer was pending, he was not informed or made aware that Paitou had applied for Worker's Compensation benefits, and he relied upon Mr. Paitou's statements concerning his employment. Mr. Licata states that during the course of his negotiations with American Transit, medical reports and records were exchanged regarding Mr. Paitou's injuries and that no claim was made for economic damages or loss of income. He further states that although his law firm inquired as to the

existence of any applicable excess insurance, American Transit informed him that no such coverage existed. Rosillo & Licata also hired an investigator regarding Mr. Sow and it was determined that Sow did not have any personal assets.

On July 1, 2004, Rosillo & Licata settled Mr. Paitou's claim against Mr. Sow for \$100,000.00, the full amount of the policy maintained by American Transit, and executed a general release. Mr. Paitou received \$67,000.00 and Rosillo & Licata received attorney's fees of \$33,000.00, equaling one-third of the settlement.

Marcus Francis, a claims representative for Hereford Insurance Company (Hereford), in a letter dated July 15, 2004 and addressed to Rosillo & Licata, stated that Hereford is the insurer for Norman Hacking Corp. for Worker's Compensation insurance, and asserted a continuing lien against any recovery for injuries or damages arising out of an occurrence on December 7, 2003. This letter identifies the employer as Norman Hacking Corp. and the claimant as Justice Paitou. Mr. Licata states in his affidavit that he received Mr. Francis' letter in August 2004, and that in his conversations with Mr. Francis he informed him that Mr. Paitou's claim against Mr. Sow had been settled; that Mr. Paitou had received payment; and that as the claim was for serious injury, the lien should be waived, as it amounted to non-economic injury. He stated that he did not hear from Hereford again until it commenced this action on June 22, 2007.

In the within action, Hereford seeks to recover the full amount of a statutory lien, in the sum of \$198,926.00, pursuant to Worker's Compensation Law section 29. Hereford alleges in its complaint that it issued a Worker's Compensation Insurance policy to Sofi Hacking Corporation ("Sofi"); that on December 9 [sic], 2003, Justice Paitou was an employee of Sofi and that he sustained personal injuries during the course of his employment while removing an object from the trunk of his vehicle when he was struck by a vehicle driven by Bakary Sow.

Plaintiff alleges that Sofi filed a C-2 "Employer's Report of Injury/Illness" dated December 17, 2003 with the Worker's Compensation Board; that the claim was assigned an index number; that at a Worker's Compensation Board hearing held on February 25, 2005, it was determined that Mr. Paitou had a work related injury to his right leg and that his average weekly wage for the year worked prior to his work related injury was \$250.00; that the Board directed the claimant to "produce proof of consent to settle third party action and closing statement from third party action"; and that no further action was taken by the Worker's Compensation

Board. It is alleged that Hereford paid medical and indemnity benefits to Mr. Paitou or his medical providers, totaling \$296,904.88. Hereford further alleges in its complaint that Mr. Paitou, through his counsel Rosillo & Licata commenced a third-party personal injury action in the Supreme Court.

The documentary evidence submitted herein includes a form entitled "Employer's Report of Work-Related Accident/Occupational Disease" which was filed with the Worker's Compensation Board identifies Mr. Paitou's employer as Norman Hacking Corp., states that the nature of the business is a medallion taxi lease, and states that injured person (Mr. Paitou) is a "TAXI DRIVER SELF CONTRACTOR." The Worker's Compensation Board's notice of decision, identifies the claimant as Justice Paitoo, his employer as Sofi Hacking Corp., and the carrier as Hereford Insurance Company.

A health insurance claim form which states that services were rendered at Lincoln Hospital lists the "insurance plan name or program name" as HEREFORD INS CO (WC/NO FAULT)," but does not include the name of an employer. Other medical charges generated by New York Presbyterian Hospital lists the insured as Justice Paitoo, the "group name" as "SOFFIES CAB CO," and the payer as "Hereford Insurance Co."

The Worker's Compensation Board issued a notice of decision, filed on March 3, 2005, which states as follows:

"At the Worker's Compensation hearing held on 2/25/05 involving the claim of Justice Paitoo at the Yonkers hearing location, Judge Gail Watson made the following decision, findings and directions:"

"DECISION: The claimant Justice Paitoo had a work related injury to his right leg. The claimant's average weekly wage for the year worked before this work related injury or occupational disease is determined to be \$250.00 per week per C-8 without prejudice."

"Claimant to produce proof of consent to settle third party action and closing statement from third party action."

"No further action pending same. No further action is planned by the Board at this time."

This decision identified Mr. Paitou's employer as Sofi Hacking Corp., and the compensation carrier as Hereford.

A second Notice of Decision filed on June 20, 2005 states that a Worker's Compensation hearing was held on June 14, 2005, and that Mr. Paitou was directed to "produce proof of settlement with consent and closing statement for 3rd party action. No further action is planned by the Board at this time."

A third Notice of Decision filed on July 27, 2005 states that at the hearing held on July 21, 2005, "Claimant did not appear to pursue the claim. Claimant has not yet produced proof of consent to settle his 3rd party action. No further action is planned by the Board at this time."

There is no evidence that the Worker's Compensation Board awarded Mr. Paitou benefits arising out of the December 7, 2003 accident. Therefore, Hereford's claimed lien only pertains to the settlement paid by the insurance carrier who insured the vehicle operated by Mr. Sow. Although Hereford alleges in its complaint that a third-party action was commenced in the Supreme Court, no evidence has been submitted which establishes that an action was ever commenced by Rosillo & Licata, or any other law firm or attorney, on behalf of Mr. Paitou pertaining to the December 7, 2003 accident. It therefore appears that Mr. Paitou's claim against the insurer of Mr. Sow's vehicle, American Transit, was settled without the commencement of an action, for the sum of \$100,000.00, the full value of that insurance policy. It is undisputed that Mr. Paitou received \$67,000.00 and that Rosillo & Licata received a legal fee equal to \$33,000.00, which represented one-third of the settlement.

Contrary to Rosillo & Licata's claim herein, Hereford's complaint does not assert a cause of action for negligence as regards this defendant. Rather, plaintiff seeks to enforce a statutory lien against both Rosillo & Licata and Mr. Paitou, pursuant to Worker's Compensation section 29. Worker's Compensation Law section 29(1) provides that a workers' compensation carrier is entitled to be reimbursed for all indemnity and medical benefits paid up to the date of the third party action recovery, whether that recovery is by way of settlement or judgment, "after deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery." Plaintiff thus may not seek to enforce a lien pursuant to Worker's Compensation Law section 29 against Rosillo & Licata based upon the settlement of the claim and the payment of said law firm's attorney's fees.

The Court makes no determination at this time as to the amount of the lien plaintiff may seek against Mr. Paitou, as neither plaintiff nor Mr. Paitou have made a cross motion seeking such

relief. The court further notes that as counsel for Rosillo & Licata does not represent Mr. Paitou in this action, counsel may not assert any arguments on his behalf.

In view of the foregoing, defendant's motion to dismiss the complaint is granted, and the complaint is dismissed with prejudice as to both the moving defendant Rosillo & Licata and Justice Paitou.

Dated: January 13, 2009

J.S.C.

Appearances:

For plaintiff Hereford Insurance Co.: Stewart Greenblatt Manning & Baez, by Ricardo A. Baez and Lisa Levine, Esqs., 6800 Jericho Turnpike, Syosset, NY 11791-4436, tel. 516-433-6677

For defendant Rosillo & Licata: Kaufman Borgeest & Ryan, LLP, by Jonathan B. Bruno and Ryan F. Blackmer, Esqs., 120 Broadway, [floor 14], NY, NY 10271-1699, tel. 212-980-9600

For defendant Justice Paitou: No appearance