Amendoeira v City of New York
2024 NY Slip Op 34159(U)
November 25, 2024
Supreme Court, New York County
Docket Number: Index No. 150123/2016
Judge: Richard Tsai

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD TSAI **PART** 21

Justice

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MANUEL AMENDOEIRA and MARIA AMENDOEIRA,

Plaintiffs,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, and the METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

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INDEX NO. 150123/2016

MOTION DATE 08/15/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 1, 88-100 were read on this motion for DISCOVERY.

APPEARANCES

Marc J. Bern & Partners, LLP, Manhattan (*Margaret E. Cordner*, of counsel), for plaintiffs.
Lewis Brisbois Bisgaard & Smith LLP, Manhattan (*Brian Pearn*, of counsel), for defendants.

OPINION OF THE COURT

RICHARD TSAI, J.

In this action alleging personal injuries arising out of a construction accident, which was settled in principle during mediation, plaintiffs now move to compel defendants to disclose the amount of a Medicare Set Aside that would be a component of the settlement. Defendants oppose the motion.

BACKGROUND

On January 31, 2015, at approximately 11:00 a.m., plaintiff Manuel Amendoeira allegedly fell off a platform approximately five to six feet above the ground while performing work on the construction of the Second Avenue subway, allegedly resulting in permanent injuries (*see* affirmation of plaintiffs' counsel in support of motion ¶¶ 3-4 [NYSCEF Doc. No. 89]). His wife asserts derivative claims (*see* NYSCEF Doc. No. 1 [complaint] ¶¶ 131-141]).

On February 20, 2024, the case settled in principle at a mediation before National Arbitration and Mediation (*see* defendants' Exhibit E in opposition [NYSCEF

Doc. No. 100]). According to a post-mediation agreement, "All payments shall be made no later pursuant to CPLR and subj[ect] to WC Approval & consent. [Plaintiff] will be resp for any MSA, if req'd" (*id.*). According to plaintiffs' counsel, the agreement was therefore "contingent on the Medicare Set Aside amount for Plaintiff and the Worker's compensation lien amount" (affirmation of plaintiffs' counsel in support of motion ¶ 6).

Plaintiffs' counsel claims to have repeatedly contacted the defendants' workers' compensation insurance carrier, AIG, to obtain the amount of the Medicare Set Aside (MSA), without success (*see* affirmation of plaintiffs' counsel in support of motion ¶¶ 8-12).

On November 7, 2024, this court held oral argument virtually via MS Teams, which was not on the stenographic record.

DISCUSSION

Plaintiffs argue that pursuant to CPLR Article 31, they are entitled to compel defendants to provide the amount of the MSA under the rules of discovery, analogizing the amount of the MSA to the amount of an outstanding lien (affirmation of plaintiffs' counsel ¶ 14).

In opposition, defendants' counsel asserts that defendants are not in control the Workers' Compensation claim, lien, or the MSA, which AIG is handling (affirmation of defendants' counsel in opposition ¶ 4 [NYSCEF Doc. No. 95]). Defendants dispute plaintiffs' contention that AIG was unresponsive. Defendants' counsel claims that it has been actively assisting and attempting to obtain the final MSA and Workers' Compensation Lien for the plaintiffs' counsel, so that the settlement agreement can be finalized, as purportedly evidenced by emails between defendants' counsel and AIG's workers' compensation handler (*id.* ¶ 5; *see also* defendants' Exhibits A & B in opposition [NYSCEF Doc. Nos. 96 & 97]).

At oral argument, plaintiffs' counsel indicated that AIG had informed plaintiffs' counsel that the MSA could not be finalized without certain information from plaintiff Manuel Amendoeira's providers. Defendants' counsel claimed that, to finalize the MSA, AIG needs information regarding the following:

(1) Naproxen;
(2) Oxycodone and dosages;
(3) a TENS unit;
(4) a formal letter from the treating physician (physical medicine) about frequency of pain management consults; and
(5) the need for future back surgery (whether lumbar laminectomy or fusion).

According to defendants' counsel, the providers refused to speak directly to AIG. However, plaintiffs' counsel argued that requiring plaintiffs to obtain the information

which would be burdensome, because plaintiff Manuel Amendoeira is disabled and has language barriers.

Plaintiffs' motion to compel defendants to provide the amount of the MSA is denied, because it does not constitute information which can be obtained in discovery pursuant to CPLR Article 31. Rather, because the MSA is a component of settlement, the court therefore cannot compel defendants to fix a specific amount.

Some background about MSAs is warranted.

> "Statutorily, Medicare has the right under the Secondary Payer Statute to recover medical expenses from work related injuries that it has paid that should have been paid by another source. When future medical expenses are a component of a worker's compensation settlement, federal law requires that Medicare's interest must be considered as part of the settlement. If Medicare's interests are not taken into account as part of the settlement, Medicare can refuse to pay for future medical expenses up to the amount of any lump-sum worker's compensation settlement and recover the amount of its paid medical expenses, including interest and potentially double damages, from the primary payer (i.e., applicant or maybe applicant's attorney) or even any entity responsible for making the primary payment (including an employer or insurance carrier).
>
> To avoid these problems, Medicare has developed an alternative, a Medicare set aside Trust (MSA), whereby insurers and employers 'set aside' an amount or an annuity to pay for future medical bills and future Medicare prosecution is waived. The looming issue for most practitioners at the time of a worker's compensation settlement is whether or not a MSA is actually needed" (Jay E. Grenig and Nathan A. Fishbach, Methods of Practice § 90:166. [5th ed, 2A West's Wis Prac, Nov 2024 update]).

"In the settlement context, one method that has emerged to comply with the MSP [Medicare Secondary Payor Act] is to create a set-aside arrangement where a portion of the settlement is allocated for the injured party's future medical expenses (i.e., an MSA)" (*Early v Carnival Corp.*, 2013 WL 462580, at *1 [SD Fla 2013] [internal citations omitted]).

> "[C]laimant must, as part of the approval process, set aside, in a discrete account, a certain Medicare-prescribed portion of the lump sum to be used for funding work-related medical treatment billings until the fund is depleted. This has become universally known as a Medicare Set Aside account ('MSA'). Only then may the claimant and healthcare providers turn to Medicare to cover treatment from the work injury"
> (David B. Torrey, Andrew E. Greenberg, Lee Fiederer, Workers' Compensation § 16:96 [4th ed, 8 West PA Prac Series, Aug 2024 update]).

The Centers for Medicare & Medicaid Services (CMS) has issued a reference guide on MSAs (*see Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide, version 4.1* https://www.cms.gov/files/document/wcmsa-reference-guide-version-41.pdf [last accessed Nov. 24, 2024]). According to the Reference Guide, CMS will review an MSA when:

> "• The claimant is a Medicare beneficiary and the total settlement amount is greater than $25,000.00; or
> • The claimant has a reasonable expectation of Medicare enrollment within 30 months of the settlement date and the anticipated total settlement amount for future medical expenses and disability or lost wages over the life or duration of the settlement agreement is expected to be greater than $250,000.00"

(*id.* at 9).

Unlike an existing lien, the amount of an MSA here is apparently a component of a global settlement that would include settlement of this action along with workers' compensation claims, and so the amount of the MSA would be a negotiated term of the amount that would be allocated for future medical expenses. Thus, the amount of an MSA is not a fact that is discoverable. Rather, plaintiffs are apparently asking the court to compel defendants to fix the amount of the MSA under the guise of seeking discovery.

While this court discussed with the parties' counsel possible ways to resolve the practical impediments to obtain the information relevant to ascertaining the amount of future medical expenses for the MSA, the court cannot force defendants either to settle on any particular terms, for any particular amount, or to settle at all.

Therefore, plaintiffs' motion to compel is denied.

CONCLUSION

It is hereby **ORDERED** that plaintiffs' motion to compel defendants to disclose the Medicare Set Aside amount within seven days (Motion Seq. No. 003) is **DENIED**.

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11/25/2024
DATE

RICHARD TSAI, J.S.C.

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