

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 TRIAL DIVISION—CIVIL

<p>JEROME ASKEW <i>Plaintiff</i></p> <p style="text-align: center;">v.</p> <p>THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA et al. <i>Defendants</i></p>	<p>DOCKETED :</p> <p>FEB 26 2014 :</p> <p>C HART :</p> <p>CIVIL ADMINISTRATION :</p>	<p>June Term, 2012</p> <p>Case No. 01590</p> <p>Commerce Program</p> <p>Control Nos. 13101270, 13110159</p>
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ORDER

AND NOW, this 27 day of February, 2014, upon consideration of the Renewed Motion for Summary Judgment of defendants Chartis Insurance Company, the Insurance Company of the State of Pennsylvania and APG International, Inc., the Cross-Motion for Partial Summary Judgment of plaintiff Jerome Askew, the respective memoranda of law in support and opposition to the motions, and defendants' Reply in Further Support of their Renewed Motion for Summary Judgment, it is **ORDERED** as follows:

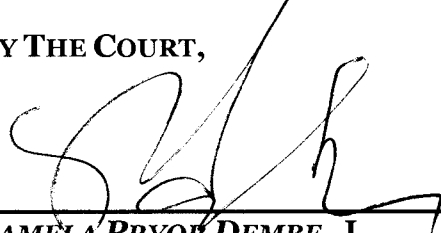
1. The Renewed Motion for Summary Judgment of defendants Chartis Insurance Company, the Insurance Company of the State of Pennsylvania and APG International, Inc. is **GRANTED**. Defendants' worker compensation lien asserted against the third-party recovery of plaintiff Jerome Askew is **VALID** and **ENFORCEABLE** pursuant to N.J.S.A. 34:15-40;
2. The Cross-Motion for Partial Summary Judgment of plaintiff Jerome Askew is **DENIED**;

Askew Vs Chartis Insura-ORDOP



3. The complaint of plaintiff Jerome Askew is **DISMISSED**; and,
4. The counterclaim of defendant Insurance Company of the State of Pennsylvania is **DISMISSED**.

BY THE COURT,



PAMELA PRYOR DEMBE, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL**

JEROME ASKEW	:	June Term, 2012
<i>Plaintiff</i>	:	Case No. 01590
v.	:	
THE INSURANCE COMPANY OF THE STATE OF	:	Commerce Program
PENNSYLVANIA et al.	:	Control Nos. 13101270,
<i>Defendants</i>	:	13110159

MEMORANDUM OPINION

Two motions for summary judgment ask this court to determine whether a contractual provision, which requires a construction company to waive its subrogation rights as against the owner, general manager and any contractors involved in a construction project, also applies to an insurer that provided the construction company with workers' compensation insurance. For the reasons below, this court finds that the contractual provision does not extend the waiver of subrogation rights to the insurance carrier.

Background

Plaintiff Jerome Askew ("Askew"), is an individual residing in New Jersey. Defendant APG International, Inc. ("APG"), is a New Jersey corporation engaged in the construction trade. At all times relevant to this action, Askew was employed by APG, and APG was performing work at a New Jersey construction site owned by the Revel Entertainment Group ("Owner"). A non-party to this action, "Tishman," acted as

construction manager and agent of Owner. Defendant Chartis Insurance Company (“Chartis”), a Pennsylvania entity, is engaged in the insurance business. Defendant, The Insurance Company of the State of Pennsylvania (“ISOP”), is an insurer based in Pennsylvania and affiliated with Chartis. At all times relevant to this action, ISOP provided APG with a “Workers Compensation and Employers Liability Policy.”¹

On July 30, 2009, APG and Owner entered into a construction contract for the development of a gambling, resort and entertainment complex in New Jersey.² Tishman executed the contract on behalf of Owner.³ Pursuant to the contract, Owner, Tishman, APG and any other contractor and subcontractor involved in the project was required to obtain insurance from a carrier affiliated with, or controlled by, Chartis.⁴

On March 10, 2010, Askew suffered injury while performing work on behalf of APG; consequently, ISOP began making payments to Askew pursuant to the requirements of the Workers Compensation and Employers Liability Policy issued in favor of APG. After sustaining his injury, Askew sued Tishman as general manager of the construction project (the “Underlying Action”). The Underlying Action was filed in the Court of Common Pleas of Philadelphia County.⁵

By letter dated May 20, 2010, Chartis informed Askew that ISOP had placed a lien upon any funds which Askew could recover in his action against Tishman. The

¹ Workers Compensation and Employers Liability Policy, No. WC 002–25–1663, Exhibit A to ISOP’s Renewed Motion for Summary Judgment.

² Construction Contract for the “Development and Operation of a First Class Casino/Hotel, Resort and Entertainment Complex,” Exhibit B to the Renewed Motion for Summary Judgment of defendant ISOP.

³ *Id.*, p. 25.

⁴ Construction Contract for the “Development and Operation of a First Class Casino/Hotel, Resort and Entertainment Complex,” Exhibit B to the Renewed Motion for Summary Judgment of defendant ISOP, ¶ 30.

⁵ *Jerome Askew v. Tishman Construction Corporation et al.*, case no. 1011-00813.

letter specifically stated:

We are the recovery agents for [ISOP] the Workers' Compensation carrier for [APG]....

Please take notice that we claim a lien against any recovery by [Askew,] by settlement or verdict[,] to the extent of benefits paid [under the Workers Compensation and Employers Liability Policy]. The amount of our lien is \$12,644.64. This amount may be subject to change as future payments are made.⁶

In subsequent letters, Chartis notified Askew that the amount of its lien kept rising as additional worker's compensation payments were made to Askew under policy.⁷

Askew and Tishman settled the Underlying Action before trial. Under the terms of the settlement, Askew agreed to end the Underlying Action in exchange for payment of \$750,000 from Tishman. On April 12, 2012, after the parties settled, Askew filed a praecipe to mark the Underlying Action settled, discontinued and ended.⁸

On June 13, 2012, Askew filed the instant action against ISOP, Chartis and APG. In count I of its complaint Askew asks this court to declare that APG, ISOP and Chartis are not entitled to any subrogation right against the \$750,000 recovered by Askew in the Underlying Action. Count II of the complaint asserts that Chartis and ISOP, by asserting an invalid lien against the funds recovered in the Underlying Action, acted in bad faith and caused Askew to incur unnecessary legal expenditures.

On August 6, 2012, defendant ISOP filed an answer to Askew's complaint with new matter and a single counterclaim sounding in declaratory judgment. Through its

⁶ Letter from Chartis to Askew, Exhibit C to the Renewed Motion for Summary Judgment of defendant ISOP.

⁷ Exhibit C to the Renewed Motion for Summary Judgment of defendant ISOP.

⁸ Jerome Askew v. Tishman Construction Corporation et al., case no. 1011-00813.

counterclaim, ISOP seeks a declaration that it has a proper contractual and statutory lien on the workers' compensation benefits paid to Askew.⁹

On November 8, 2012, ISOP filed a Motion for Summary Judgment asking the Court to rule that its lien against Askew's settlement was valid and enforceable. On December 20, 2013, this court, the Honorable Judge Albert John Snite, Jr., issued an Order denying the motion without prejudice. The Order gave ISOP leave to re-file a Motion for Summary Judgment at the close of discovery.

On October 9, 2013, after discovery closed, defendant ISOP re-filed its Motion for Summary Judgment. This renewed motion asks the Court to rule that ISOP's lien upon Askew's settlement is valid and enforceable. On October 31, 2013, Askew timely filed his own Motion for Partial Summary Judgment. This motion asks the Court to rule that ISOP has no rights to workers' compensation subrogation because such rights were waived pursuant to the construction contract between APG and Owner.

The parties timely filed responses and briefs in support and opposition to the respective motions. The motions are now ripe for a ruling.¹⁰

Discussion

The Pennsylvania Rules of Civil Procedure that govern summary judgment instruct in relevant part[] that the court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery.

⁹ Answer of defendant ISOP to the complaint of plaintiff Askew, Counterclaim at ¶ 13.

¹⁰ This case was re-assigned to the Honorable Judge Pamela Pryor Dembe of the Commerce Program when the Honorable Judge Albert John Snite, Jr. moved from the Commerce Program to the Major Jury, Day-Forward Program.

Under the Rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law.

In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt.¹¹

I. New Jersey's statutory law allows ISOP to assert a right of subrogation.

ISOP's Motion for Summary Judgment argues that it is entitled to assert a right of subrogation against Askew's settlement funds pursuant to New Jersey's Labor and Workmen's Compensation Statute, N.J.S.A. 34:15-40—Liability of Third Party.¹²

According to ISOP, its right of subrogation arises from a statutory provision designed to prevent "workers' compensation claimants from obtaining double recoveries."¹³ The pertinent statutory provision cited by ISOP states:

¹¹ Fine v. Checcio, 582 Pa. 253, 265, 870 A.2d 850, 857 (2005). The court also notes that "[w]henver Pennsylvania is the chosen forum state for a civil action, our state's procedural rules i.e. the Pennsylvania Rules of Civil Procedure govern, no matter what substantive law our courts must apply in resolving the underlying legal issues." Ferraro v. McCarthy-Pascuzzo, 2001 Pa. Super 156, 777 A.2d 1128, 1137 (Pa. Super. 2001).

¹² To determine whether the law of New Jersey applies to the issues presented by ISOP's motion, this court will employ a choice-of-law analysis as explained in Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000) ("In Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary.") In this case, a comparison between the New Jersey and Pennsylvania statutes, N.J. Stat. Ann. § 34:15-40 and 77 P.S. § 671, as well as case law from each jurisdiction, reveals that the laws of the two competing States are substantially similar. See Frazier v. New Jersey Mfrs. Ins. Co., 667 A.2d 670, 673, 674 (N.J.1995) (holding that N.J.S.A. 34:15-40 was enacted to prevent an employee from obtaining double recovery from injury). See also Com., Dep't of Labor & Indus., Bureau of Workers' Comp. v. W.C.A.B. (Old Republic Ins. Co.), 2 A.3d 790, 792 (Pa. Commw. 2010) ("Subrogation is an equitable remedy that prevents double recovery.") Since there is no substantial difference between the pertinent laws of New Jersey and Pennsylvania, no further analysis is necessary and the substantive laws of New Jersey will apply toward resolution of ISOP's Motion for Summary Judgment.

¹³ ISOP's memorandum of law in support of its Renewed Motion for Summary Judgment at IV—B (i).

Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein....

- (a) The obligation of the employer or his insurance carrier under this statute to make compensation payments shall continue until the payment, if any, by such third person or his insurance carrier is made....
- (b) If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined....
- (e) As used in this section, "expenses of suit" shall mean such expenses, but not in excess of \$750 and "attorney's fee" shall mean such fee, but not in excess of 33 1/3 % of that part of the sum paid in release or in judgment to the injured employee or his dependents by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled in reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding....¹⁴

In Pennsylvania, it is "the responsibility of the courts to interpret statutes and declare their applicability to existing facts and situations."¹⁵ This court finds that the language of N.J.S.A. 34:15-40 is clear and unambiguous: when an injured employee recovers from a third party a sum which is equivalent to, or greater than the liability of the employer, the employer, or his workers' compensation carrier, is entitled to

¹⁴ N.J. Stat. Ann. § 34:15-40 (2007).

¹⁵ *Com. v. Am. Ice Co.*, 406 Pa. 322, 332, 178 A.2d 768, 773 (1962).

reimbursement for medical expenses incurred, and compensation payments made to the injured employee, minus specifically defined lawsuit expenses and attorney's fees.¹⁶

Applying the New Jersey statute to the facts in this case, this court finds that Askew, the injured employee of APG, obtained workmen's compensation benefits through APG's worker compensation carrier, ISOP. In addition to benefits received under the workmen's compensation statute, Askew recovered \$750,000 from a settlement in the Underlying Action with third-party Tishman. Thus, this court finds that ISOP is entitled to obtain reimbursements from Askew consistently with the requirements of N.J.S.A.

34:15–40.¹⁷

II. The construction contract between APG and Owner does not operate as a waiver of ISOP's subrogation rights under the N.J.S.A. 34:15–40.

The Motion for Partial Summary Judgment of Askew asserts that ISOP is not entitled to assert a subrogation right because APG waived such a right pursuant to a provision contained in the construction contract executed by APG and Owner. The pertinent provision states:

49. By entering into this Agreement, Contractor [APG] shall been deemed to have **waived all rights of subrogation**

¹⁶ This court's interpretation of N.J.S.A. 34:15-40 is consistent with New Jersey case law: "[o]ne of the basic concepts in [New Jersey's] Workers' Compensation scheme can be found in *N.J.S.A. 34:15-40*, which bars double recoveries from Workers' Compensation and third party recoveries." *Rosales v. State Dep't of Judiciary*, 373 N.J. Super. 29, 42, 860 A.2d 929, 937 (App. Div. 2004) (holding that Workers' Compensation payments may be offset against other disability benefits where such benefits are based upon the same disability).

¹⁷ In his opposition to ISOP's Renewed Motion for Summary Judgment, Askew argues that any subrogation rights of ISOP were waived under the construction contract entered into by APG and Owner. Askew relies on *Skulksie v. Ceponis*, N.J. Super. 510; 962 A.2d 589 (App. Div. 2009) for the proposition that subrogation rights may be "waived or limited by agreement." Memorandum of law in opposition to ISOP's Renewed Motion for Summary Judgment, IV–B. Reliance on *Skulksie* is misplaced because in that case an insurance carrier attempting to assert a subrogation right had contractually waived such a right in exchange for the privilege of insuring unit owners of a condominium association. In this case, conversely, there is no evidence whatsoever that ISOP waived its statutory right of subrogation when it insured APG. *Skulksie v. Ceponis*, N.J. Super. At 512; 962 A.2d at 590.

and recovery against Owner, its designee(s), broker(s), Construction Manager [Tishman] and Contractor(s) of all tiers to the extent of any loss or damage, which is insured under the OCIP.¹⁸

In Pennsylvania,

[t]he task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is ... to ascertain the intent of the parties as manifested by the language of the written instrument.... Where ... the language of the contract is clear and unambiguous, a court is required to give effect to that language.¹⁹

In this case, the clear and unambiguous language of the above-cited contract leaves no doubt: the project's Owner, the general manager and contractor thereof (Tishman and APG), and any "Contractors of all tiers," waived their rights to subrogation against each other. This language however does not state that the waiver, while applying to Owner, Tishman, APG and all contractors, also applies to any insurance carrier involved in the construction project. Therefore, this court finds that the construction contract executed by APG as contractor, and by Tishman on behalf of Owner, does not waive ISOP's right of subrogation. ISOP's worker compensation lien asserted against the third-party recovery of plaintiff Jerome Askew is valid and enforceable. For this reason, Count I of the complaint seeking a declaration that ISOP's subrogation right was waived is dismissed. In addition, since ISOP is entitled to assert a lien on payments made to Askew, this court finds that ISOP and Chartis did not act in bad faith when they asserted the lien. Therefore, Askew's claim of bad faith in Count II

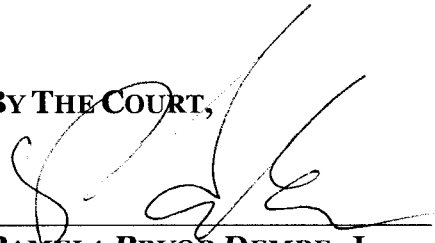
¹⁸ Construction Contract for the "Development and Operation of a First Class Casino/Hotel, Resort and Entertainment Complex," Exhibit B to the Renewed Motion for Summary Judgment of defendant ISOP, ¶ 49 (emphasis supplied).

¹⁹ Standard Venetian Blind Co. v. Am. Empire Ins. Co., 503 Pa. 300, 304-05, 469 A.2d 563, 566 (1983).

of the complaint is dismissed. Finally, the counterclaim of defendant ISOP is also dismissed because it sought the same relief which this court has thus granted through defendants' Renewed Motion for Summary Judgment.

The court shall issue a simultaneous Order consistent with this Memorandum Opinion.

BY THE COURT,



PAMELA PRYOR DEMBE, J.