

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
LORRAINE KANDEL, as Administratrix of the Estate
of JOSEPH KANDEL, Deceased, and LORRAINE KANDEL,
individually,

Plaintiffs,

v.

M. GIDEON DRIMER, M.D.,

Defendant.
-----X

Index No.: 7437/99

NOTICE OF MOTION

Hon. J. Taylor

Returnable: March 18, 2003

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of Mark R. Bower, duly affirmed February 27, 2003, together with the exhibits annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Queens Courthouse located at 88-11 Sutphin Boulevard, Jamaica, New York 11435, Part 15, on **Tuesday, March 18, 2003**, at 9:30 AM, or as soon thereafter as counsel can be heard for an Order:

**Extinguishing the purported lien and/or
subrogation rights
asserted by The Rawlings Company and Aetna US
Healthcare.**

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are to be served upon the undersigned not less than seven days prior to the return date herein. CPLR 2214(b).

Dated: New York, NY
February 27, 2003

Law Offices of Mark R. Bower, P.C.
Attorneys for Plaintiffs
15 Maiden Lane, 16th Fl.
New York, NY 10038

TO:
Thomas Willinger
The Rawlings Company
P.O. Box 740027

Louisville, Kentucky 40201-7427

Marulli and Associates
Attorneys for Defendant Dr. Drimer
115 Broadway, 12th floor
New York, NY 10006

Risk Management
Long Island Jewish Hospital
270-05 76th Ave.
New Hyde Park, NY 11040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
LORRAINE **KANDEL**, as Administratrix of the Estate
of JOSEPH KANDEL, Deceased, and LORRAINE
KANDEL, individually,

Index No.: 7437/99

Plaintiffs,

**AFFIRMATION
IN SUPPORT**

v.

M. GIDEON **DRIMER**, M.D.,

Defendant.
-----X

Mark R. Bower, an attorney admitted to practice before the Courts of this State affirms the truth of the following under the penalty of perjury:

I am the proprietor of the Law Offices of Mark R. Bower, P.C., attorneys for the plaintiffs herein and as such I am generally familiar with the facts and circumstances of this action based upon a review of the case file and the investigation materials contained therein.

This application, brought on by Order to Show Cause, seeks an Order:

**Extinguishing the purported lien and/or subrogation
rights asserted by The Rawlings Company and Aetna US
Healthcare.**

This is a medical malpractice action to recover damages for the wrongful death of Joseph Kandel. In brief, it was alleged that Mr. Kandel died of lung cancer because his primary care physician, defendant Dr. Drimer, failed to perform routine screening examinations of a prolonged course of continuing treatment over 19 years. When the cancer was finally diagnosed, it had grown to incurable proportions, and Mr. Kandel was dead within a few weeks.

A combined action for decedent's wrongful death and conscious pain and suffering was commenced against Dr. Drimer on April 1, 1999. Thereafter, we took the case to trial on February 20,

2002, before Justice Taylor. After several court appearances, plaintiffs have agreed to Dr. Drimer's offer to settle the claim for the sum of \$275,000.00.

Astipulation stating that the settlement amount was for the wrongful death claim only, and did not compensate the plaintiff for medical bills of the decedent was put on the record (Exhibit A) and also So Ordered by Judge Taylor on June 14, 2002 (Exhibit B).

A Compromise Order has not yet been presented, pending the outcome of this motion.

During the pendency of this case, we received letters from various health insurance providers claiming a right to share in the recovery of this case, either by way of lien or subrogation rights. These liens were dealt with accordingly.

We recently received a letter from The Rawlings Company on behalf of Aetna US Healthcare, dated January 17, 2003, in which they asserted a lien of \$58,570.70 (Exhibit C). Aetna was Mr. Kandel's employee insurance carrier.

This office called Thomas Willinger, Rawlings' Subrogation Analyst, and told him that Aetna, and therefore Rawlings, had no right to reimbursement for payments that they were contractually required to make under Mr. Kandel's insurance policy. Mr. Willinger faxed this office two pages from the policy (Exhibit D).

Plaintiff now seeks an Order to the effect that the respondents have no lien, no right to subrogation, and no right to intervene in this case pursuant to the applicable statutes and case law.

**THE LANGUAGE OF MR. KANDEL'S INSURANCE POLICY
SPECIFICALLY DOES NOT ALLOW AETNA TO RECOVER
MONIES FROM A SETTLEMENT FOR PAIN AND SUFFERING**

The contract between Mr. Kandel and Aetna states under "Third Party Liability and Right of Recovery":

"The right of recovery will only be exercised by HMO when the amounts received by the Member through a third party settlement or satisfied judgment are specifically identified in the settlement or judgment as the amount previously paid by HMO for the same Medical Services and benefits." (Exhibit D.)

The settlement agreement, as detailed in the So Ordered Stipulation, states, “The cause of action for wrongful death is settled for \$275,000.00 (Two Hundred Seventy Five Thousand Dollars). The settlement is for wrongful death only, and is not intended and does not compensate plaintiff for medical bills of the decedent.” (Exhibit B.)

The same statement was put on the record in open court. (Exhibit A.)

Any question whether Rawlings/Aetna has a lien on Mr. Kandel’s settlement should be resolved on this point alone.

**FURTHERMORE, UNDER NEW YORK STATE LAW,
RESPONDENTS CAN HAVE NO LIEN, CLAIM,
OR SUBROGATION INTEREST IN THE PROCEEDS OF THIS CASE.**

In the seminal case of Humbach v. Goldstein, 229 A.D.2d 64, 653 N.Y.S.2d 950 (2nd Dept. 1997), the Appellate Division, Second Department, held that plaintiff’s health care insurer had no right to intervene and no subrogation interest in the outcome of the case.

The Appellate Division noted that, under the principles of equitable subrogation, an insurer is placed in the same position of its insured, and as such its rights are derivative in nature and limited to whatever rights its insured would have against a third party. In other words, a healthcare insurer can not have a greater right in equitable subrogation than its’ insured has at law.

Given these principles, the respondents herein have no right to any share of the recovery in this case. CPLR §4545(c) limits plaintiff’s ultimate recovery to that portion of the medical expenses which plaintiff has paid out-of-pocket. Thus, since plaintiff has no right to recover that portion of the medical expenses which were paid for by the respondents, the respondents can have no lien or subrogation right with respect to those very same payments.

The Humbach court held,

“The Court of Appeals has not ruled on the effect of CPLR §4545 on the issues before us, which involve the pre-verdict stage. However, since Oxford paid the plaintiff’s medical costs, CPLR §4545 would be applicable to any verdict in the instant action. Oxford could not recover, by verdict after trial, the cost of the plaintiffs’ medical care which was reimbursed by Oxford, without running afoul of the rule that **Oxford’s rights of recovery under subrogation can not be any more than the plaintiff’s right of recovery**, or

without running afoul of CPLR §4545.” Humbach, *supra*, at 67 (emphasis added).

In the case at bar, since respondents’ rights of recovery under subrogation can be no greater than plaintiff’s rights, and since plaintiff would ultimately have no right to recover medical expenses which were reimbursed by respondents, then there can be no lien or subrogation interest in the proceeds of this lawsuit, as a matter of law.

In coming to its decision the Humbach court cited several factors, including the legislative intent behind CPLR §4545 and the prejudice to the parties in the underlying tort case.

With respect to legislative intent the Humbach Court noted as follows at page 67:

“The purpose of CPLR §4545 is not only to prevent double recovery by plaintiffs but also to keep down the liability insurance costs of policyholders.... The question of whether the defendant’s liability insurance carriers should be held ultimately responsible for all of plaintiff’s damages, even for damages specified in CPLR §4545 which have been compensated from collateral sources, is a question best left to the legislature, and not to the court.” Humbach at pp. 67-68 (emphasis added).

On the issue of prejudice to the parties in the case, the Humbach court noted that if health care insurers were permitted to be involved in tort actions, it would create an adversarial posture between health care insurers and plaintiffs, and would transform simple personal injury actions into complex, unmanageable multiparty litigation. Additionally, plaintiff would be prejudiced by a jury’s speculation that plaintiff was already compensated from other sources.

Similarly in McGuire v. The Long Island Jewish-Hillside Medical Center, 654 N.Y.S.2d 420 (2nd Dept. 1997), the Second Department affirmed the denial of a health care insurer’s request to intervention. See also Warner v. University Hospital at Stonybrook, 246 A.D.2d 535, 666 N.Y.S.2d.931 (2nd Dept. 1998), in which it was also held that a health care insurer had no rights with respect to an underlying medical malpractice action; and Pell v. Malibu Resorts International, LTD., 248 A.D.2d 605, 669 N.Y.S.2d. 939 (2nd Dept. 1998), in which it was once again held that plaintiff’s health care insurer had no rights in the underlying personal injury case. See also Soden v. Long Island Railroad Company, 277 A.D.2d 442, 715 N.Y.S.2d 892 (2nd Dept. 2000), in which an identical result was reached on these issues.

Furthermore, in Oxford Health Plans, Inc. v. Augustino Deli and Caterers, Inc., 724 N.Y.S.2d 338 (2nd Dept. 2001), the IAS Court had issued an Order dismissing the subrogation claims of the health care insurer. This dismissal was Affirmed by the Appellate Division Second Department.

The same result was reached by the Appellate Division First Department, the case of Halloran v. Don's 47 West 44th Street Restaurant Corp., 255 A.D.2d 206, 680 N.Y.S.2d 227, (1st Dept. 1998).

In the case at hand, plaintiff seeks an identical decision from this Court, namely an Order to the effect that the respondents/health care insurers herein have no lien or subrogation rights.

Plaintiff is specifically not seeking reimbursement of that portion of the medical expenses which have been reimbursed by collateral sources. The basis for this is that under CPLR §4545 plaintiff ultimately has no right to recover these expenses. Clearly if plaintiff has no right to recover these expenses, neither can the respondents herein whose rights in subrogation can be no greater than plaintiff's remedy at law. Since plaintiff has no rights to recover these expenses, the respondents/health care insurers have no rights in this matter either, whether by lien or by equitable subrogation.

Accordingly plaintiff respectfully requests an Order extinguishing any lien or subrogation interest which the respondent has asserted in this case. Such an Order would be consistent with the legislative intent surrounding CPLR §4545, which, as noted in Humbuch, *supra*, was to reduce liability insurance costs. In view of this clear legislative intent this Court should not drive up the costs to the defendants' liability insurance carriers, merely to enrich the respondents, who are strangers to this litigation and who were contractually bound to pay for plaintiff's medical bills in the first instance.

Plaintiff therefore requests and Order:

**Extinguishing the purported lien and/or
subrogation rights
asserted by The Rawlings Company and Aetna US
Healthcare.**

No previous application has been made for the relief sought herein.

WHEREFORE, it is respectfully requested that the instant Motion be granted in its entirety, and for such other and further relief as to this Court may seem just.

Dated: New York, New York
February 27, 2003

Mark R. Bower
Law Offices of Mark R. Bower, P.C.
15 Maiden Lane, 16th Floor
New York, NY 10038
(212) 240-0700

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

VIDAL ANDINO, being duly sworn deposes and says:

I am not a party to this action. I am over the age of eighteen (18) years of age and resides in Queens, NY

That on February 26th, 2003, he served the within **MOTION**, by depositing a true copy thereof in a properly sealed, first-class postpaid envelope, in a post office box regularly maintained by the Post Office of the United States addressed as follows:

Thomas Willinger
The Rawlings Company
P.O Box 740027
Louisville, Kentucky 40201-7427

Marulli and Associates
Attorneys for Defendant Dr. Drimer
115 Broadway, 12th floor
New York, NY 10006

Risk Management
Long Island Jewish Hospital
270-05 76th Ave.
New Hyde Park, NY 11040

that being the address designated on the latest papers served by them in this action.

VIDAL ANDINO

Sworn to before me this
27th day of February, 2003

NOTARY PUBLIC