2017 IL App (1st) 161495-U

FOURTH DIVISION
July 27, 2017

No. 1-16-1495

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YOLANDA LORENTE, LTD,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	2011 L 14042
	)	
ABERDEEN CONSTRUCTION CO., an Illinois Corporation,	)	Honorable
ZLATAN COVIC, and NIKOLA NOZINIC,	)	Cassandra Lewis,
	)	Judge Presiding
Defendants-Appellants.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly found that defendants were entitled to a setoff against the judgment based on their pro rata portion of a pretrial subrogation settlement which was entered into by multiple defendants.

¶ 2 This appeal arises from an action for damages sustained by plaintiff Yolanda Lorente, LTD (Lorente) as a result of construction work performed by defendants, Aberdeen Construction Company, Zlatan Covic, and Nikola Nozinic (collectively Aberdeen). In this appeal, we are asked to determine the appropriate setoff amount to which Aberdeen is entitled based on a pretrial settlement of a subrogation action.

¶ 3 The record shows that on December 30, 2011, Lorente brought suit against Aberdeen as well as other codefendants, John Sears, Emanuel Regalis and 1825 Newport (collectively Newport), who are not parties to this appeal, for damages to Lorente's business and materials arising out of Aberdeen's construction work in the building owned by Newport. On December 10, 2013, Lorente's insurance company filed a complaint seeking subrogation for $323,342.16 which had been advanced to Lorente, and the parties' insurance carriers subsequently settled the subrogation action in October 2014 for $190,000; $107,500 of which was paid by Newport's insurance carrier, and $82,500 was paid by Aberdeen's insurance carrier. Thereafter, on November 6, 2014, Newport paid plaintiff $260,000 in full settlement of Lorente's claims against them. Lorente's claims against Aberdeen proceeded to trial by jury, which found in Lorente's favor. The trial court entered judgment on the verdict for Lorente in the amount of $624,687.66.

¶ 4 Following trial, Aberdeen filed a motion for a setoff. Aberdeen claimed, and Lorente subsequently agreed, that Aberdeen was entitled to a setoff against the judgment of $260,000 for the Newport settlement. Aberdeen also claimed, pursuant to *Segovia v. Romero*, 2014 IL App (1st) 122392, to be entitled to a setoff of $323,342.16, the entire subrogation amount originally sought and subsequently released by Lorente's insurance carrier. Lorente, conversely, contended that Aberdeen was only entitled to a setoff of $82,500, the amount actually paid by Aberdeen's insurance carrier to settle the subrogation action.

¶ 5 On April 29, 2016, the trial court entered an order on Aberdeen's motion for a setoff. The trial court noted that it was undisputed that Aberdeen was entitled to a $260,000 setoff for Newport's settlement pursuant to the Joint Tortfeasors Contribution Act. It was also undisputed that Aberdeen was entitled to a setoff for the payment in the subrogation action, however the

parties disagreed on the appropriate amount. After summarizing each party's position, the court found that Aberdeen was entitled to a setoff between the parties' proposals. The trial court stated that Aberdeen was entitled to a setoff "equal to his pro rata share of the amount prayed for in [the insurance company]'s original complaint." Because the $82,500 contribution by Aberdeen's insurance company "represents 43.422% of the total $190,000 that was paid by both insurance companies[,]" Aberdeen was "entitled to a set-off equal to 43.422% of the amount originally sought [in the subrogation action]: $140,401.56." The trial court entered judgment in Lorente's favor for $224,286.10, which included a total setoff of $400,401.56.

¶ 6 Both parties appealed, and in this court, they argue that the trial court erred by failing to find that the proper setoff amount was the one proposed by each party. We first note that in this court, as well as in the trial court, it is undisputed that Aberdeen is entitled to a $260,000 setoff for the amount paid by Newport in settlement of Lorente's claims against them pursuant to the Joint Tortfeasor Contribution Act. The only question posed by this appeal is the appropriate setoff amount to which Aberdeen is entitled for the subrogation action. Aberdeen contends that the trial court erred by failing to grant them a setoff of $323,342.16, the full amount originally sought by Lorente's insurer in the subrogation action. Lorente, conversely, contends that Aberdeen's setoff should have been limited to $82,500, the amount actually paid by Aberdeen's insurance carrier in the settlement, and that any additional setoff is "barred by the long established Collateral Source Rule." To resolve this question, we must determine the applicability of the collateral source rule, and we review *de novo* the question of Aberdeen's setoff entitlement. *Segovia v. Romero*, 2014 IL App (1st) 122392, ¶ 18, citing *Thornton v. Garcini,* 237 Ill. 2d 100, 115–16 (2010). Because both Aberdeen's appeal and Lorente's cross-

appeal concern the proper setoff amount to which Aberdeen was entitled, we will address both appeals simultaneously.

¶ 7 Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor. *Wills v. Foster,* 229 Ill. 2d 393, 399 (2008); *Arthur v. Catour,* 216 Ill. 2d 72, 78 (2005), quoting *Wilson v. The Hoffman Group, Inc.,* 131 Ill. 2d 308, 320 (1989)). The collateral payments made to or benefits conferred on the plaintiff do not reduce the defendant's liability, even though they reduce a plaintiff's losses. *Wills,* 229 Ill. 2d at 402 (citing *Arthur,* 216 Ill. 2d at 78–79). The collateral source rule " ' "bars a defendant from reducing the plaintiff's compensatory award by the amount the plaintiff received from the collateral source" ' " (*Wills,* 229 Ill. 2d at 400 (quoting *Arthur,* 216 Ill. 2d at 80, quoting James M. Fischer, Understanding Remedies § 12(a), at 77 (1999))) and is considered an exception to the general rule that damages in negligence actions must be compensatory (*Wills,* 229 Ill. 2d at 399).

¶ 8 The collateral source rule applies frequently in cases where the defendant seeks a reduction of damages because the plaintiff has received insurance benefits that partly or wholly indemnify the plaintiff for the loss. *Arthur v. Catour*, 216 Ill. 2d 72, 79 (2005). In such circumstances, it is well established that the damages are not decreased by the amount that the plaintiff received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums. *Id.* " 'The justification for this rule is that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and third persons.' " *Id.*, quoting *Wilson*, 131 Ill. 2d at 320. The supreme court has recognized that, "Although the rule

appears to allow a double recovery, * * * typically, the collateral source will have a lien or subrogation right that prevents such double recovery." *Wills,* 229 Ill. 2d at 399.

¶ 9 As stated, the collateral source rule applies to "benefits received by the injured party from a source *wholly independent of, and collateral to, the tortfeasor*." (emphasis added) *Wills,* 229 Ill. 2d at 399. Where, as here, a defendant's insurer makes payments to settle a subrogation suit by the plaintiff's insurer, this court has held that "those benefits do come from defendant or a person acting for him" and thus, the collateral source rule does not apply. *Segovia v. Romero*, 2014 IL App (1st) 122392.

¶ 10 In *Segovia*, the plaintiff brought a personal injury action against the defendant for injuries arising out of a car accident. A jury found in favor of the plaintiff and awarded her $5,395 in damages for her medical care. The defendant then brought a post-trial motion for a setoff of medical payments that had been previously paid to State Farm, the plaintiff's husband's insurer, by American Heartland, defendant's insurer, in a subrogation action. The trial court denied the defendant's motion, and defendant appealed. This court reversed, finding that defendant was "entitled to a $5,000 setoff for the amount of medpay benefits claimed by State Farm that was settled for $2,500 in the subrogation action."

¶ 11 This court noted that "the collateral source rule would apply to any benefits State Farm conferred on plaintiff" since State Farm was a " 'source wholly independent of, and collateral to, [defendant] the tortfeasor.' " However, the "defendant [wa]s not seeking setoff for the medical benefits State Farm conferred on plaintiff. Rather, he [wa]s seeking setoff for the amount he or, more accurately, his insurer American Heartland, paid State Farm to settle State Farm's subrogation action against him for the benefits State Farm asserted it conferred on plaintiff and/or her husband." We concluded that American Heartland, as defendant's insurer, was not a

"collateral source"; rather, it was "a source related to defendant through contract" that had paid "State Farm on defendant's behalf and it will probably have to pay for the final damages awarded against defendant. Without setoff, defendant, through his insurer, will have to pay twice for the same medical expenses." We thus found that the collateral source rule did not apply, that the trial court erred in denying the defendant's motion for setoff, and that the defendant was entitled to a setoff of $5,000—"the amount of medpay benefits claimed by State Farm that was settled for $2,500 in the subrogation action."

¶ 12 We conclude, like in *Segovia*, that the collateral source rule does not apply to bar Aberdeen from a setoff based on the settlement of the subrogation action. Like in *Segovia*, Aberdeen is not seeking to setoff the payment Lorente received from its insurer. Rather, it is seeking a setoff related to a prior settlement of a subrogation action. Also like in *Segovia*, Aberdeen's setoff is not limited by the amount they actually paid, but they are entitled to a setoff which represents the amount that was sought from Aberdeen when Lorente's insurer chose to settle its subrogation claim. See *Segovia*, 2014 IL App (1st) 122392, at 585 ("defendant is entitled to a $5,000 setoff for the amount of medpay benefits claimed by State Farm that was settled for $2,500 in the subrogation action."). We reject Lorente's unsupported invitation to "declare the *Segovia* decision erroneous and incorrect."

¶ 13 This case, however, is complicated by the fact that the subrogation action was not against a single defendant, but rather separate defendants who each settled with Lorente's insurance company by paying separate portions of a total amount. Specifically, $107,500 of the settlement was paid by Newport's insurance carrier, while $82,500 was paid by Aberdeen's insurance carrier.

¶ 14 To resolve this issue, the trial court recognized that Aberdeen and Newport effectively settled the subrogation action in differing portions. In essence, Aberdeen settled a $140,398.40 (43.421% of $323,342.16) claim for $82,500, whereas Newport settled a $182,943.76 (55.579% of $323,342.16) claim for $107,500. There is nothing in the record that would indicate that the parties settled the subrogation action in anything other than a proportionate manner. In these circumstances, we conclude that the trial court correctly determined that Aberdeen was entitled to a pro rata setoff based on their proportionate share of the subrogation action settlement. Such apportionment ensures that Aberdeen is adequately credited with the benefit of its pretrial settlement of the subrogation action, without unduly profiting from the settlement of separate codefendants. Had the trial court followed Aberdeen's proposal, and determined that Aberdeen was entitled to the full amount sought by Lorente's insurer that was subsequently settled by both Newport and Aberdeen, Aberdeen would be receiving a benefit from Newport's subrogation settlement in violation of the collateral source rule. Aberdeen is not entitled to a setoff based on the portion of the settlement attributable to Newport, since Newport's insurer is a "source wholly independent of, and collateral to, the tortfeasor" Aberdeen. *Wills,* 229 Ill. 2d at 399

¶ 15 Although the trial court correctly determined that Aberdeen was entitled to a setoff based on a pro rata share of the settlement, we also find a slight error in its calculation. Aberdeen's $82,500 contribution represented 43.421% of the total $190,000 settlement, not 43.422% as the trial court calculated. Thus, Aberdeen is entitled to a pro rata setoff of $140,398.40 for the subrogation action, for a total setoff of $400,398.40.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, as modified.

¶ 17 Affirmed, as modified.