

MEMORANDUM

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 16

JUAN VICENTE ECHEVERRIA,

Plaintiff,

INDEX NO.: 018666/2002

- against -

THE ESTATE OF MARVIN L. LINDNER, a partnership,
NORMAN A. SHEFER, T&O ASSOCIATES LIMITED,
JEK ENTERPRISES, INC., KENNY DOYLE, GEORGE
ALBRO and PREFERRED BACKHOE SERVICE,

Defendants.

T&O ASSOCIATES LIMITED,

Third-Party Plaintiff,

-against-

ALWAYS EQUIPMENT INCORPORATED,

Third-Party Defendant.

In the instant case the court is not asked to address any issue beyond damages suffered by this undocumented day laborer in an accident under section 240 of the Labor Law (fall from scaffold). In fact, the matter was sent to the court as an inquest after all but the defaulting defendants had settled the matter immediately prior to the trial on

October 27, 2004. No appearance was made by the defaulting defendants, JEK Enterprises, Inc. and Kenny Doyle, at any time in this case and no evidence was presented in opposition to the damage issue.

However, two issues have arisen which the court believes should be addressed. The first involves a company called LawCash which either loaned, "funded" or advanced to plaintiff or invested in plaintiff's action \$25,000.00 as of November 25, 2003 at an obviously usurious rate of interest of 3.85% per month compounded monthly; this may or may not also constitute Champerty. The other is related to whether plaintiff's status as an undocumented alien (court translation - illegal alien) should have any effect on his recovery of future damages. Should such a decision be based on law or economics or on a Brandeisian view of both?

Initially, the court will set forth certain basic findings of fact as to the plaintiff's accident as well as the \$25,000.00 received from LawCash.

Findings of Fact and Conclusions of Law After Inquest

This matter was assigned to this part from the Calendar Control Part on November 1, 2004 for the purpose of conducting an inquest as to defaulting parties JEK Enterprises, Inc. and Kenny Doyle.

History

The plaintiff, Juan Vincente Echeverria, who, according to counsel, was born on January 16, 1982, was injured in an elevation related construction accident on September 1, 2000. By order of the Honorable Thomas Phelan, dated June 4, 2003, a default judgment was granted against JEK Enterprises, Inc. and Kenny Doyle, deferring the inquest to the trial justice assigned to the action. By order of the Honorable Thomas Phelan, dated August 2, 2004, summary judgment on the issue of liability under Labor Law section 240 was granted to the plaintiff against defendants, the Estate of Marvin L. Lindner, a partnership, Norman A. Shefer and T&O Associates Limited. (As noted earlier, the actions against these answering defendants and a third-party defendant were

settled just prior to jury selection on October 27, 2004.)

Inquest Testimony

On September 1, 2000, Juan Vincente Echeverria was severely injured when he fell from an elevated work platform (a per se violation of Labor Law section 240). His injuries consisted of:

- a) significant head trauma with loss of consciousness with frontal and occipital scalp lacerations which required staples and resulted in scarring;
- b) fracture of the left 4th and 5th metacarpals requiring closed reduction;
- c) compression fracture of L1;
- d) lacerations of the front left torso resulting in striated scar deformities;
- e) possible fracture at the base of the 3rd metacarpal;
- f) possible dislocation of the coccyx;
- g) constant and daily pain, with aching, stiffness and decreased range of motion in the cervical and lumbar spines with pain radiating into both arms;
- h) low back pain with moderate intensity which is daily but prolonged by sitting and standing; pain radiating into the back into legs; subluxation complexes at L2-3, L3-4, L4-5 and T-10-11. The foregoing vertebral subluxation complex was confirmed with diagnostic ultrasound;
- i) on December 8, 2003, plaintiff underwent a posterior spinal fusion from T12 to L2 with application of 15 cc's of cancellous allograft bone chips with posterolateral arthrodesis under general anesthesia with all of the risks attendant to said general anesthesia with surgical scarring.

In that three defendants settled and one defendant defaulted, there was no testimony to contradict the plaintiff or his medical records.

At the time of the plaintiff's injuries he was being paid by the defaulting defendants the sum of \$80.00 per day, in cash. The plaintiff was injured on the second day of work for the defaulting defendants. He had been picked up by the defendant at a street corner where he "shaped up." The defendant employer, not surprisingly, did not have Worker's Compensation coverage on the plaintiff.

Following his injury, plaintiff received chiropractic care from Dr. Cappel Mayreis incurring bills totaling \$37,080.43 for which reimbursement is requested (under other circumstances the court would question this bill).

When chiropractic care did not alleviate plaintiff's symptoms, he came under the care of orthopedic surgeon Philip Rafiy who ultimately performed the spinal fusion surgery noted above. The plaintiff testified that the surgery has left the plaintiff with an ongoing disability and recurring pain. This limits his ability, given his seventh grade education, to obtain employment for which he is qualified. However, the court has received no information that would indicate he is prevented from continuing his education and could not become employed in some other fashion than as a day laborer.

In order to pay for the surgery and ancillary expenses associated therewith, the plaintiff borrowed the sum of \$25,000.00 from an entity known as LawCash at the rate of 3.85% per month compounded monthly. The agreement signed by the plaintiff declares this to be an investment and not a loan. LawCash is in the business of advancing "non-secured" funds. Their charges for "processing" and "funding fees" amount to the sum of \$13,916.45 up to October 31, 2004 and increasing at a daily rate of \$48.94 thereafter.

This court had little familiarity with this service (beyond a New York Law Journal article of June 23, 2004) or those of a similar nature until the instant case appeared in its courtroom. In many states an attorney may advance money to a client to finance the hiring of expert witnesses without which the case could not go forward or would be forced to settle for far less than its actual value. Not so in New York.

Attorneys in New York are barred from funding litigation expenses or maintenance

(DR 5-103(b)) when repayment is contingent on the outcome of the case. The NYSBA in 1994 rendered an ethics opinion (Opinion 666 (73-93) 6/23/94) which allowed an attorney to refer a client to a lending institution that would lend the client money for living expenses where repayment is contingent on the successful outcome of the case.

Pursuant to DR 5-103(b)(1):

[a] lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

And without mentioning ultimate client responsibility, DR 5-103(b)(2) states:

A lawyer representing an indigent client on a pro bono basis (emphasis supplied) may pay court costs and reasonable expenses of litigation on behalf of the client.

(Amended effective September 1, 1990)

None of the above, however, speaks to the issue of the interest rate charged by LawCash, only that an organization of its nature may be a valuable asset to a plaintiff attempting to prosecute an expensive litigation without independent wealth.

In June of 2004, the Attorney General announced an agreement with Cambridge Management Group, a leading player in this growing field of the “settlement advance” business. Without commenting on an interest rate that could run up to 60% per annum, the “Agreement” called for full disclosure of the total amount of the advance including all fees, interest rate and frequency of the compounding, a five day right-to-cancel, and a notarized statement from the client’s attorney that the contract was reviewed with and explained to the consumer.

Proponents of the “settlement advance” business contend it allows an injured, often out of work party, to fight off the pressure for a quick settlement. Critics say the interest on the advance, obviously of sizeable nature, and \$48.94 a day in the instant case, which continues to accrue while the case is pending, creates an added incentive to settle,

rather than relieving the pressure (the sooner you settle the sooner you stop the interest).

Plaintiff argues that the defendants by their willful failure to provide Workers Compensation Insurance for the plaintiff placed him in a position of having to seek a lender of last resort, thus, they are likewise responsible to the plaintiff for the consequential damages and costs incurred in seeking funding for his necessary medical care. The court will address this issue in its conclusion.

Specific Damages

There are five elements of damages that were addressed upon inquest: past medical expenses; past lost earnings; future lost earnings; past pain and suffering; and future pain and suffering.

Plaintiff contends he should be awarded past medical expenses in the sum of \$77,465.08 comprised of \$37,080.43 (Dr. Cappell Mayreis' bill), \$25,000.00 (Dr. Rafiy surgery hospitalization and after care bill), \$13,916.45 (LawCash cost of financing medical care), and \$1,468.20 for thirty days of interest at a rate of \$48.94 per day until plaintiff receives funds from the settlement against other defendants and pays off this bill.

As to past lost earnings, plaintiff before his accident was an able bodied young man with minimal English language skills, a seventh grade education in El Salvador, and capable of performing construction work. The defaulting defendant set his earning rate at \$80.00 per day. Plaintiffs' estimates are based on a more conservative \$75.00 per day. Plaintiff was capable of working a five day work week, but for his accident, and an award of past lost earnings in the sum of \$71,119.00, through December, 2004 (\$75.00 per day, five day work week, forty-eight weeks per year, no benefits) is appropriate. However, is it impacted by whether the plaintiff could legally be employed in the United States?

As to future lost earnings, the analysis by Dr. David Kennett argues for an award of \$1,645,275.00 presuming an actuarially reasonable work life expectancy.

Past pain and suffering of Mr. Echeverria, a now 23 year old man, includes required extensive medical care and surgery which has lead to restrictions of all of his

usual and customary daily activities and warrants an award of \$250,000.00.

Plaintiff requests an award for future pain and suffering, assuming an actuarial life expectancy of 49.1 years, of \$2,500,000.00. The court finds a more appropriate award for future pain and suffering would be \$1,000,000.00 based upon the evidence presented.

LawCash

Loan, Investment or Champerty

The instant agreement between Mr. Echeverria and LawCash, through which Mr. Echeverria received \$25,000 from LawCash and in turn agreed to repay this principle amount at an interest rate of 3.85% compounded monthly to LawCash from any judgment awarded to Mr. Echeverria does not constitute Champerty as defined and applied in New York law. The common law of Champerty has been codified in New York under Judiciary Law, mainly sections 488 and 489. Champerty prohibits any attorney, person, co-partnership or corporation from directly or indirectly taking assignment of a chose in action “with the intent and for the purpose of bringing an action or proceeding thereon” (NY Jud. Law §478, 479).

LawCash’s loan or investment, (whatever you may call it) to Mr. Echeverria can be viewed as a purchase of a chose in action; however, this advancement is still not considered Champerty. In order to constitute Champerty in New York law, the primary purpose of the purchase must be to bring suit or proceed with action upon the claim they received. Knobel v. Estate of Eugene A. Hoffman, 432 N.Y.S.2d 66, 68 (N.Y. Sup. Ct., 1980) (*see also* Moses v. McDivitt, 88 N.Y. 62, 65 (1881); Wightman v. Catlin, 981 N.Y.S. 1071 (N.Y. App. Div., 1906)). In Knobel v. Estate of Eugene Hoffman, the defendant landlord moved for dismissal claiming that the plaintiff’s attainment of power of attorney for the landlord’s tenants constituted Champerty when the plaintiff used this power of attorney to bring suit against the landlord for a “proportional share of a tax assessment refund claimed by his tenants pursuant to tax escalation clauses in their commercial leases. (Id. at 67). The court found this action by the plaintiff to be a

solicitation of a chose in action, but did not hold this to be Champerty. Id. Instead, the court noted that section 489 of the Judiciary Law applied to “the taking of claims with the intent to sue” and went on to state that if it was found that “the assignment or acquiring of an interest in the claim was intended to achieve a transfer for the ‘sole and primary purpose of bringing an action’ thereon without a legitimate reason, dismissal is required by section 489” Id. at 68 (citing Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 NY2d 325, 330; American Express Co. v. Control Data Corp., 50 AD.2d 749, Prudential Oil corp. v. Phillips Petroleum Co., 69 AD2d 763). After this the court referred the case to Trial term to hold hearings on the “key issue” of the intent and primary purpose of the agreement. Id.

In the case before this Court, the purpose and intent of purchasing the potential judgment in favor of Mr. Echeverria was not to bring an action based on LawCash’s claim to a portion of the potential judgment, but simply to profit from its loan or investment. Any legal action that may be based upon receiving its payment would be a secondary purpose and not primary. The agreement between LawCash and Mr. Echeverria states that LawCash will collect the principle, plus interest, from Mr. Echeverria only in the event that Mr. Echeverria receives a judgment resulting from his lawsuit (the contract states that any proceeds received from the suit, whether a judgment, a settlement, or otherwise would be used by Mr. Echeverria to pay LawCash). If Mr. Echeverria does not obtain a judgment, LawCash does not collect. If Mr. Echeverria does receive a judgment, LawCash will collect its principle and interest from that judgment. As noted in the agreement LawCash is not acquiring Mr. Echeverria’s right to sue, Mr. Echeverria had already commenced the lawsuit prior to signing the agreement and remained in control of the lawsuit pursuant to the agreement.

Although the agreement does suggest the possibility of LawCash engaging the services of an attorney to collect the sum due, it follows that this action would not be the primary purpose of the agreement since Mr. Echeverria agreed to voluntarily pay this sum

back to LawCash after receiving a judgment and paying his attorney fee's. Therefore the primary purpose and intent of funding Mr. Echeverria the \$25,000 and charging 3.85% interest was not to take action on their claim to the judgment, but to make a profit from their loan/investment. In other words, a chose in action has been defined as a right to recover money in a legal proceeding. If LawCash purchased Mr. Echeverria's recovery from this lawsuit with the intent of bringing a new lawsuit in order to collect that money from Mr. Echeverria, or the present defendants (whom we assume would be paying this judgment,) then we would have a champertous agreement, but this does not seem to be the intent of LawCash. LawCash has no primary intention of bringing legal action to collect the money Mr. Echeverria owes it.

While no New York court has published a decision on these facts, a very similar case was recently decided by the Supreme Court of Ohio. Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 3d 121 (Ohio 2003). Rancman involved a women who was injured in a car accident, she filed suit against her insurance company seeking uninsured motorist benefits under a policy issued to her estranged husband. Id. at 122. About a month after filing the suit Rancman contacted Interim Settlement Funding Corp. in an effort to attain an advancement of funds secured by her pending claim against the insurance company. Id. The agreement through which Rancman received this advancement was structured in a fashion very similar to the agreement between Mr. Echeverria and LawCash. Rancman received a \$6,000 advance from Interim Settlement Funding Corp. in exchange she would pay them \$16,800 if she would recover within 12 months, the amount Rancman would return to Interim depended on how long it took for her case to be resolved, and similar to Mr. Echeverria, if Rancman did not receive a judgment from her claim, she owed Interim nothing. Id. at 122, 123. The lower and intermediate courts agreed in their findings that the transactions were loans for which Interim did not have a valid license under Ohio law, so they found the loans to be void,

