2016 IL App (2d) 151243-U
No. 2-15-1243
Order filed June 14, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALEA LONDON LIMITED, n/k/a Catalina London Limited, Plaintiff, v. RHINO CONSTRUCTION AND EXCAVATING COMPANY, INC., Defendant (Eric Johnson, Defendant-Appellant; and Sundance Saloon, LLC; Sundance Investments, LLC; Creative Soundz, Inc.; Arthur Lake; David Fricke; Extreme Sound and Lighting, LLC; Highway 50, Inc.; Stage Work Projects, Inc.; and Charles Chevalier, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 09-MR-530 Honorable John J. Scully, Judge, Presiding.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff-Appellee, v. RHINO CONSTRUCTION AND EXCAVATING COMPANY, INC., Defendant	)	Appeal from the Circuit Court of Lake County. No. 09-MR-1647

	)	Honorable
	)	John J. Scully,
(Eric Johnson, Defendant-Appellant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly allowed a setoff in the amount of $260,000 from a judgment against an insurance company, which represented the amount that the injured party had previously received upon settling with tortfeasors other than the insured.

¶ 2 In *Alea London Ltd. v. Rhino Construction & Excavating Co.*, 2015 IL App (2d) 140662-U, we held that appellee, American Family Mutual Insurance Company (American Family), was liable for a $900,000 default judgment that had been entered against Rhino Construction and Excavating Company, Inc. (Rhino) in a personal injury action filed by appellant, Eric Johnson. Following the issuance of our mandate, American Family filed a motion in the circuit court of Lake County requesting a setoff in the amount of $260,000. The court granted the setoff, and Johnson appeals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 13, 2006, Johnson, an employee of Liberty Bell Electric Company (Liberty Bell), was injured while performing construction work when a steel rack fell on him. On November 6, 2007, he filed a personal injury action against six defendants, including Rhino. The complaint contained a single count of negligence, and Johnson did not attempt to distinguish between the tortious conduct of the various defendants (*E.g.*, "Defendants, and each of them, erected, constructed, placed or operated or cause [*sic*] to be erected, constructed, placed or operated, a certain metal rack to facilitate and to be used in said construction, erection, repairs, alteration, removal, and/or painting."). In March 2008, Johnson filed an amended complaint that

added four new defendants but was otherwise identical to the original complaint. In April 2008, one of the defendants in the personal injury action filed a third-party complaint for contribution against Liberty Bell.

¶ 5 Johnson subsequently entered into a settlement agreement with eight of the ten defendants and Liberty Bell for a total of $260,000. Rhino was not a party to that settlement. The record contains a memorandum of agreement indicating that the settlement was reached through mediation on August 12, 2010. According to that memorandum of agreement: one defendant would pay Johnson $20,000, while seven others would pay an aggregate of $240,000; Johnson would pay the workers' compensation lien holder $70,000; Johnson and his attorney would waive the fees and costs that are outlined in section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2014)); Liberty Bell would be released from liability; and the workers' compensation lien holder would release its lien and make no further claim upon amounts recovered by Johnson beyond the $260,000.

¶ 6 On August 26, 2010, the trial court, Judge Margaret Mullen presiding, entered an order finding that the settlement was made in good faith pursuant to the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/0.01 *et seq*. (West 2014)). Johnson thereafter moved to default Rhino. On September 9, 2010, Judge Mullen entered an order finding Rhino in default, and she set the matter for prove-up of damages on October 26, 2010. The written order entered by Judge Mullen on October 26, 2010, provides, in its entirety:

> "This cause coming on for hearing on proof of damages and the court finding that due notice has been given and having heard testimony of plaintiff and considered affidavit [*sic*] and exhibits and being fully advised in the premises[,] it is hereby ordered that judgment is entered in favor of Eric Johnson and against Rhino Construction and

Excavating Company Inc. in the sum of $900,000.00 (nine hundred thousand dollars)."

There is no transcript of the October 26, 2010, proceedings.

¶ 7 Meanwhile, two insurance companies—Alea London Limited, now known as Catalina London Limited (Alea), and American Family—disputed whether they were obligated to defend and indemnify Rhino in the personal injury action. Alea and American Family both filed declaratory judgment actions, which were later consolidated. After Alea settled with Rhino and Johnson, the matter proceeded to a bench trial on the issue of American Family's obligations to Rhino. In a written order dated February 28, 2014, Judge Mullen entered judgment in favor of Johnson and against American Family in the amount of $900,000, plus post-judgment interest commencing on October 26, 2010.

¶ 8 American Family appealed that judgment, and we affirmed in an unpublished order. *Alea London*, 2015 IL App (2d) 140662-U, ¶ 2. One of American Family's arguments on appeal was that it was entitled to a setoff pursuant to the Contribution Act for the amounts that Johnson had received from tortfeasors other than Rhino in settlement of the personal injury action. *Alea London*, 2015 IL App (2d) 140662-U, ¶¶ 46-47. However, that argument had not been raised in the trial court, and the record did not reflect the amount or terms of the August 2010 settlement. *Alea London*, 2015 IL App (2d) 140662-U, ¶¶ 10, 48. Accordingly, we expressed no opinion as to whether American Family was entitled to the requested setoff, and we said that the issue could be raised in subsequent enforcement proceedings. *Alea London*, 2015 IL App (2d) 140662-U, ¶ 51.

¶ 9 Following the issuance of our mandate, American Family filed in the trial court a motion to set off $260,000 from the $900,000 judgment entered against it. According to American Family, enforcing the entire amount of the $900,000 judgment would result in a double recovery

to Johnson in contravention of the Contribution Act, because the settlement had compensated him for the same injuries as did the default judgment. American Family also argued that it would have been improper for Judge Mullen to have considered the settlement when she entered the default judgment and that there was no indication that she had done so.

¶ 10 After American Family filed its motion for a setoff, Johnson's counsel prepared what he labeled as a "bystander's report" of the October 26, 2010, proceedings. It was not actually a bystander's report, as it did not comport with applicable court rules. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005) (requiring notice to all parties, presentation of the proposed report to the trial court for approval, and certification by the trial court). Instead, it can more accurately be described as Johnson's counsel's recollection of the October 26, 2010, prove-up proceedings, which counsel certified as true pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2014)).

¶ 11 In that "bystander's report," counsel recalled that Johnson testified at the October 26, 2010, proceedings about the nature and extent of his injuries, his lost wages, and his medical expenses. Johnson had also exhibited to the court a scar on the back of his head. According to counsel, at the conclusion of Johnson's testimony, counsel introduced into evidence the affidavit of Ivan Kostic, who was the president of Liberty Bell. In that affidavit, which was attached to the "bystander's report," Kostic averred that he had terminated Johnson's employment following the March 13, 2006, accident because Johnson was physically incapable of performing required tasks. According to Kostic, Johnson earned $17 per hour at the time of the injury and worked an average of 44 hours per week; due to his physical limitations, Johnson would now only be able to work in a position earning $7-$10 per hour.

¶ 12 Johnson's counsel also asserted in the "bystander's report" that he provided the trial court with a summary that reflected Johnson's damages. That summary outlined what counsel contended were "damages proven" in the range of $1,298,315.40 to $2,088,715.40. Among the other attachments to the "bystander's report" was a copy of the court clerk's list of exhibits that were introduced at the October 26, 2010, proceedings. According to Johnson's counsel: "Subsequent to the court having taken evidence, Judge Mullen spent several minutes reviewing the court file in my presence. Upon the completion of the review of the file and all of the exhibits tendered to her, she entered the order for judgment for $900,000." There is no mention in the "bystander's report" that Judge Mullen ever indicated that she had taken the $260,000 settlement into consideration when entering the $900,000 default judgment against Rhino.

¶ 13 In Johnson's brief in response to American Family's motion for a setoff, he repeated many of the assertions made in the "bystander's report." Johnson argued that American Family failed to prove that Judge Mullen *did not* apply a setoff in entering the default judgment against Rhino. According to Johnson, there was a "strong presumption" that Judge Mullen considered the setoff both when she entered the default judgment against Rhino in the personal injury action and when she subsequently entered the corresponding judgment against American Family in the declaratory judgment action. Moreover, Johnson proposed that the "bystander's report" supported that Judge Mullen did not ignore the settlement. He insisted that American Family was improperly attempting to shift the burden to him to prove that a setoff was unwarranted.

¶ 14 On November 18, 2015, the trial court, Judge John Scully presiding, granted American Family's motion for a setoff in the amount of $260,000 and clarified the total amount, including interest, that American Family was obligated to pay. During the hearing, Judge Scully questioned whether he should transfer the matter to Judge Mullen and "let her tell you what she

was deciding." Plaintiff's counsel responded that Judge Mullen "doesn't remember." On December 10, 2015, the trial court dismissed the case with prejudice after finding that American Family had complied with the November 18 order. Johnson timely appeals.

¶ 15 II. ANALYSIS

¶ 16 Johnson argues that the trial court erred in granting the setoff requested by American Family. Section 100/2(c) of the Contribution Act provides:

> "When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater." 740 ILCS 100/2(c) (West 2014).

This provision of the Contribution Act is intended both to prevent plaintiffs from receiving a double recovery and to " 'ensure[] that a nonsettling party will not be required to pay more than its *pro rata* share of the shared liability.' " *Thornton v. Garcini*, 237 Ill. 2d 100, 116 (2009) (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 368 (1995)). "Generally, a nonsettling party seeking a setoff bears the burden of proving what portion of a prior settlement was allocated or attributable to its share of the liability." *Thornton*, 237 Ill. 2d at 116.

¶ 17 The parties dispute the applicable standard of review. Johnson proposes that we should review the matter *de novo.* See *Board of Trustees of Community College Dist. No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259, 278 (2003) ("The question of whether the trial court should have ordered a setoff depends upon interpretation of the [Contribution Act], and is therefore

subject to *de novo* review."). American Family submits that we should review for abuse of discretion. See *Pasquale*, 166 Ill. 2d at 369 ("The determination as to which of several claims a settlement award should be attributed to is considered a matter within the trial court's discretion."). The present appeal neither requires us to interpret the Contribution Act nor to attribute settlement proceeds to particular claims. Instead, the dispute between the parties is whether Judge Mullen accounted for the $260,000 settlement when she entered the $900,000 default judgment against Rhino in October 2010. In addressing that issue, Judge Scully reviewed the same documents that are available to this court. Indeed, Judge Scully was in no better position than this court to determine what Judge Mullen considered (or did not consider) when she entered the judgments against Rhino and American Family. We are mindful that the abuse of discretion standard of review is "traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial." *In re D.T.*, 212 Ill. 2d 347, 356 (2004). Judge Scully's order granting the setoff was not that type of decision. Under these circumstances, we believe that *de novo* review is appropriate. See *Thornton*, 237 Ill. 2d at 115-16 ("The determination of whether a defendant is entitled to a setoff is a question of law and, therefore, subject to *de novo* review.").

¶ 18 Johnson argues that American Family failed to present any evidence to substantiate its assertion that a double recovery would result without the requested setoff. According to Johnson, by suggesting that there was no evidence that Judge Mullen *had* considered the settlement, American Family improperly sought to shift the burden to him. Furthermore, emphasizing that the total amount of his award without the requested setoff ($260,000 + $900,000 = $1,160.00) "is significantly less than the amount of *** Johnson's provable damages as presented in the personal injury case," Johnson insists that he would not receive a double

recovery. In support of that contention, he notes that at the prove-up hearing he presented Judge Mullen with a summary reflecting damages totaling between $1,298,315.40 and $2,088,715.40. Furthermore, Johnson argues that it would have been proper for Judge Mullen to have applied a setoff before entering the judgment against Rhino at the prove-up hearing. To that end, he submits that Judge Mullen understood that he had previously settled with other defendants. Johnson also proposes that, in light of the fact that courts may *sua sponte* order a setoff where the record reflects that a plaintiff has settled with other tortfeasors with respect to the same injury (see *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 558 (1980)), "it is reasonable to conclude that Judge Mullen applied the $260,000 as a set off and entered judgment against the defaulted Rhino for a net amount of $900,000 after taking the setoff into account."

¶ 19 American Family responds that a setoff is necessary to avoid a double recovery, because Johnson filed a "single personal injury action for his single indivisible injury" and was compensated by other defendants for the same damages. According to American Family, the $900,000 default judgment capped Johnson's damages, and "this is a simple and routine case of contribution wherein a joint tortfeasor is entitled to reduce a judgment against it by the amount a plaintiff already received in settlement from other joint tortfeasors." Moreover, American Family notes that there is no evidence that Judge Mullen considered the settlement at the prove-up hearing or that she entered the $900,000 judgment as a net award. In the alternative to its argument that Johnson suffered a single, indivisible injury, American Family contends that it should not bear the burden of apportioning damages where Johnson has failed to do so.

¶ 20 In his reply brief, Johnson asserts: "[T]he record does not show that the settlement and the judgment are attributable to the same *damages*. The settlement and judgment may relate to the same injury, but as Johnson established in the opening brief, [American Family] failed to

provide any evidence to establish that Johnson would receive a double recovery of damages without a setoff." (Emphasis in original.)

¶ 21 We hold that the trial court did not err in granting a setoff in the amount of $260,000 toward the judgment against American Family. Johnson no longer disputes that the settlement compensated him for the same injuries as did the subsequent judgments against Rhino and American Family. This is a departure from what he argued in the previous appeal. See *Alea London*, 2015 IL App (2d) 140662-U, ¶ 50 (we noted that Johnson contended that it was "speculative to assume that the settlement compensated Johnson for the same injury as the default judgment against Rhino."). Johnson hints in his reply brief that the settlement may have been attributable to different *damages* than were at issue in the judgments against Rhino and American Family. However, he does not elaborate on this point. This court has said that "where there is a single and indivisible injury caused by the negligence of defendants, the damages are inseparable, and any amounts received from any of the defendants must be deducted from the total damages sustained." *Klier v. Siegel*, 200 Ill. App. 3d 121, 127 (1990).

¶ 22 Moreover, although Johnson does not meaningfully attempt to analogize the facts of the matter at hand to the cases he cites, we note that many of his cases involve multiple plaintiffs, multiple claims, or litigants filing suit in multiple capacities (*i.e.*, both individually and as the representative of a decedent's estate). These cases do not support Johnson's position on appeal. Johnson filed suit in only one capacity and did so via a single negligence count that did not differentiate between the defendants' tortious conduct.

¶ 23 We must also reject Johnson's argument that American Family failed to present evidence to substantiate its assertion that a double recovery would result without the requested setoff. American Family supported its motion with numerous exhibits that clearly demonstrated a right

to setoff, including, for example: Johnson's original and amended complaints in the personal injury action; the settling defendants' agreed motion for good faith findings; the August 26, 2010, court order finding that the settlement was reached in good faith; the October 26, 2010, order entering a $900,000 default judgment against Rhino; and the February 28, 2014, order in the declaratory judgment actions entering judgment against American Family. Nothing in those documents supports Johnson's theory that Judge Mullen took (or might have taken) the $260,000 into consideration either when she entered the $900,000 judgment against Rhino or when she subsequently entered judgment against American Family. As we noted in our prior decision in this case, the issue of a setoff pertaining to the settlement in the personal injury action was raised for the first time on appeal. *Alea London*, 2015 IL App (2d) 140662-U, ¶¶ 48-49.

¶ 24 Johnson insists that Judge Mullen would have been justified in applying the setoff at the time she entered the default judgment against Rhino, even without a request from any party. See *Dial*, 81 Ill. 2d at 558 (the supreme court remanded the matter to the trial court for consideration of a setoff, even though the defendant had not raised the issue). However, there is nothing in the record to support that Judge Mullen would have applied a setoff in this case and entered a "net judgment" without documenting as much in the written order or even telling anyone that she was doing so. The "bystander's report" prepared by Johnson's counsel did not indicate that Judge Mullen ever mentioned a setoff during the October 26, 2010, proceedings. This is not a matter of burden shifting, and we stress that Johnson never bore the burden to prove anything. Instead, it is Johnson who is unjustifiably attempting to impose on American Family the burden of proving a negative—that Judge Mullen did *not* take the $260,000 settlement into account at the time she entered the judgments against Rhino and American Family, even though she never indicated that

she was doing so. Johnson does not cite any case law that would justify holding American Family to such an impossible burden of proof.

¶ 25 Furthermore, Johnson's attempt to rely on his "provable damages" of between $1,298,315.40 and $2,088,715.40 as supporting that he will not receive a double recovery is misguided. Johnson may very well have requested damages in that range at the prove-up hearing against Rhino, but Judge Mullen did not enter an award in that range. Once again, from the record before us, it is readily apparent that (1) the settlement compensated Johnson for the same injuries/damages as the subsequent judgments against Rhino and American Family and (2) Judge Mullen did not enter a "net judgment," contrary to what Johnson suggests.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 28 Affirmed.