

Stacey Colson v. Town of Randolph

(June 4, 2010)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Stacey Colson

Opinion No. 20-10WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Town of Randolph

For: Patricia Moulton Powden  
Commissioner

State File No. U-09762

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**ATTORNEYS:**

Jill Jourdan, Esq., for Claimant  
John Leddy, Esq., for Defendant

**ISSUE PRESENTED:**

Should Defendant's workers' compensation insurance carrier be held responsible for failing to withhold from its lump sum payment of compensation benefits the fees due Claimant's attorney in accordance with her approved lien against such compensation?

**FINDINGS OF FACT:**

Considering the facts in the light most favorable to the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. Claimant suffered a work-related injury on December 16, 2003. On June 8, 2005 he entered into a fee agreement by which he retained Attorney Jourdan to represent him in his pending workers' compensation claim.
2. On April 8, 2005 the Vermont Office of Child Support (OCS) issued two "Summons to Trustee for Administrative Trustee Process" to the Vermont League of Cities and Towns (VLCT), Defendant's workers' compensation insurance carrier. Together, the summons informed VLCT of Claimant's child support obligations in two pending Family Court proceedings, one totaling \$8,662.91 and the other totaling \$11,222.66. In accordance with 15 V.S.A. §799, the summons notified VLCT of its obligation "to secure and hold [Claimant's] assets in its possession" up to the amounts specified in each and, if the trustee process was uncontested, to tender the assets to OCS. VLCT received both summons on April 12, 2005.

3. On June 12, 2006 VLCT sent Attorney Jourdan a proposed Agreement for Permanent Partial Disability Compensation (Form 22) for her client's review and signature. The proposed agreement provided for permanent partial disability benefits totaling \$9,784.63.
4. In its June 12, 2006 mailing, VLCT also suggested that if Claimant wished to receive his permanency benefits in a lump sum Attorney Jourdan should make a written request to that effect, which VLCT's adjuster indicated she would support and ask the Department to approve.
5. On October 12, 2006 OCS notified Attorney Jourdan that in April 2005 it had "filed liens with regard to [Claimant's] two child support cases" with VLCT. There is no evidence that Claimant had ever contested OCS' right to trustee process against his workers' compensation benefits in either case.
6. On December 18, 2006 Attorney Jourdan corresponded with the Department as follows:

I write to enclose a copy of my fee agreement with Stacey Colson and put the Department on notice that the Office of Child Support has perfected a lien on any settlement due Mr. Colson. Accordingly, I have been instructed by OCS to file my fee agreement with the Department so that my attorney's fees may be paid before distribution of the settlement with OCS.

Attorney Jourdan did not copy VLCT on this letter.

7. The Department construed Attorney Jourdan's letter as a request for an attorney's lien under 21 V.S.A. §682. By letter dated January 4, 2007 it granted the lien. The letter also advised Attorney Jourdan that in order to enforce the lien she would have to submit an itemized statement of her work and billings, in accordance with Workers' Compensation Rule 10.5000. This Attorney Jourdan did on January 20, 2007.
8. VLCT was copied on the Department's January 4, 2007 correspondence, in which Attorney Jourdan's lien was approved, but not on Attorney Jourdan's January 20, 2007 response.
9. On April 13, 2007 Claimant executed the Form 22 and mailed it to VLCT for its signature. In her cover letter, Attorney Jourdan advised that she had requested a lump sum payment and asked VLCT to inform the Department that it did not object.

10. Also on April 13, 2007 Attorney Jourdan corresponded with the Department, with a copy to VLCT's adjuster, as follows:

I am writing to request that Mr. Colson's permanent partial settlement be distributed in a lump sum.

In my request for lump sum distribution, pursuant to Rule 19, I suggest the following as support for my request:

- 1) The settlement is going to be distributed to the Office of Child Support toward Mr. Colson's child support arrearage.
- 2) If the Department determines that a lump sum is not appropriate, we request that you distribute 20% of the lump sum payment for payment of Mr. Colson's attorney's fees as he cannot pay these fees otherwise.

11. On April 17, 2007 VLCT executed the Form 22 and submitted it to the Department for approval along with a letter that stated in part:

Ms. Jourdan is requesting a lump sum payment and asking that the check be made to the Office of Child Support. I am in agreement with a lump sum payment and ask that you please approve this lump sum payment under [Mr. Colson's] workers compensation claim."

VLCT did not copy Attorney Jourdan on this letter.

12. On April 30, 2007 the Department approved both the Form 22 and Claimant's request for a lump sum payment of the permanency benefits due him. Both Attorney Jourdan and VLCT were copied on this correspondence.
13. In May 2007 VLCT paid the entire amount of Claimant's lump sum settlement to OCS, without withholding anything to satisfy Attorney Jourdan's approved attorney's lien. In doing so, it apparently interpreted Attorney Jourdan's April 13, 2007 letter as evidencing her intent to enforce her attorney's lien *only if* the Department determined that a lump sum distribution to OCS would not be appropriate.
14. Attorney Jourdan did not learn of VLCT's action until June or July 2007. Subsequently she requested that the Department enter an order against VLCT to enforce her attorney's lien. The Department denied this request, first informally and later in the context of the Commissioner's ruling on the parties' cross motions for summary judgment.<sup>1</sup> In both instances the Department construed Attorney Jourdan's April 13, 2007 letter as a constructive waiver of her claim for attorney fees in the event that the lump sum distribution to OCS was approved, which it was.

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<sup>1</sup> *Colson v. Town of Randolph*, Opinion No. 34-08WC (August 7, 2008).

15. On appeal under 21 V.S.A. §670, the Washington Superior Court reversed the Commissioner's determination on the grounds that Attorney Jourdan's April 13, 2007 letter did not amount to either an express or implied waiver of her attorney's lien. *Stacey Colson v. Town of Randolph*, Docket No. 594-9-08 Wncv (August 27, 2009). The Court remanded the action to the Department to address VLCT's other defenses. These defenses relate primarily to the question whether, at the time that VLCT tendered payment of Claimant's workers' compensation benefits, OCS' claim had priority over Attorney Jourdan's lien, such that VLCT was legally bound to direct full payment of those funds to OCS. The current cross motions for summary judgment followed.
16. According to the affidavit of Michael Rowley, an attorney for OCS, as a matter of course when attaching a workers' compensation settlement attorney's liens are routinely given priority and honored prior to distribution of the settlement by the workers' compensation carrier.

#### **DISCUSSION:**

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).
2. The Washington Superior Court having disposed of VLCT's waiver argument on appeal, the principal issue before me now is whether Attorney Jourdan's lien deserves priority over OCS' trustee process or vice versa.
3. With reference to Attorney Rowley's affidavit, Attorney Jourdan argues that OCS routinely recognizes the priority of an attorney's lien over its own child support attachments. To do so, she asserts, is in keeping with strong public policy. It encourages a process by which workers' compensation claimants can gain access to legal representation that they otherwise might not be able to afford.
4. In contrast, VLCT argues that according to both the plain language of Vermont's child support enforcement statute and the common law, OCS' trustee process takes priority over Attorney Jourdan's lien. Were VLCT to have paid any portion of Claimant's lump sum settlement to Attorney Jourdan rather than to OCS, it asserts, it would have subjected itself to fines and civil penalties. Thus, it argues, it acted appropriately by paying OCS' lien first.

### Attorney Jourdan's Lien

5. Under Vermont's workers' compensation statute an attorney who provides legal services in prosecuting an injured worker's claim for benefits can claim a lien against the benefits ultimately awarded. 21 V.S.A. §682. Workers' Compensation Rule 10.5000 governs the process by which such liens are approved and enforced.
6. I find that Attorney Jourdan satisfied the requirements of both the statute and the rule. Her attorney's lien was approved on January 4, 2007 and became enforceable on January 20, 2007.

### OCS' Right to Trustee Process

7. OCS' right to trustee process against Claimant's workers' compensation benefits arises from Vermont's child support enforcement statute, 15 V.S.A. §§780 *et seq.* That statute defines "wages" to include workers' compensation payments, 15 V.S.A. §780(9), and provides for trustee process as one of a variety of mechanisms available to recoup delinquent child support payments. 15 V.S.A. §799.
8. I find that VLCT was properly notified of OCS' claim against Claimant's workers' compensation benefits at least by April 12, 2005, the date it received OCS' Summons for Administrative Trustee Process. There being no evidence that Claimant ever contested either OCS' right to trustee process or its calculation of the amounts due, VLCT became obligated as of that date to tender any monies that otherwise would have been payable to Claimant to OCS instead.

### Determining Priority

9. Trustee process becomes enforceable against a third party in whose hands a debtor's property lies when the monies sought are "due absolutely and without contingency" at the time the third party is served. *Sullivan v. R.E. Bean Construction Co., Inc.*, 147 Vt. 310, 312-13 (1986). That occurred in this case on April 12, 2005, nearly two years before Attorney Jourdan's lien was approved. As of that date, and until the amounts stated in the trustee process summons were satisfied, VLCT was obligated to put OCS' trustee process-derived claim against the funds it held on Claimant's behalf first, ahead of any claim it received subsequently, including Attorney Jourdan's.
10. I do not doubt, as Attorney Rowley testified in his affidavit, that OCS routinely honors a claimant's attorney's lien prior to attaching workers' compensation benefits. There is nothing in the statute that requires OCS to do so, however.<sup>2</sup> That being the case, it was incumbent on Attorney Jourdan to take the appropriate steps, not simply to ensure that OCS would honor her lien in this case, but more importantly to ensure that VLCT was aware of the fact. This she failed to do. That as it turned out VLCT was not aware of OCS' custom is her responsibility, not theirs.

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<sup>2</sup> To the contrary, the child support enforcement statute specifically provides that "a wage withholding order under this chapter *shall have priority* over other legal process against the same wages . . ." 15 V.S.A. §789(b) (emphasis added).

11. I conclude as a matter of law that VLCT acted appropriately in paying over the entire proceeds of Claimant's workers' compensation award in accordance with OCS' trustee process summons. As the amount of the award was insufficient to cover the amount owed OCS, VLCT had no monies remaining with which to satisfy Attorney Jourdan's lien, and therefore no obligation to do so.

**ORDER:**

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.  
Claimant's Motion for Summary Judgment is **DENIED**.

**DATED** at Montpelier, Vermont this 4<sup>th</sup> day of June 2010.

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Patricia Moulton Powden  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.