

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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DESI MOORE and KAREN SMITH,

Index No: 4355/03
Motion Date: 5/21/03
Motion Cal. No: 31

Plaintiffs,

-against-

JAMAICA BUSES, INC., and ROBERT A.
SADOCHA,

Defendants.

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The following papers numbered 1 to 8 read on this motion for an order, pursuant to CPLR 3211(a)(5), dismissing the complaint on the ground that the causes of action may no longer be maintained because of payment to plaintiff Desi Moore, and her release of defendants.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavits-Exhibits.....	5 - 8

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is a negligence action for personal injuries allegedly sustained by plaintiffs, arising from a motor vehicle accident on May 7, 2001. Plaintiffs commenced action against defendants by service of the pleadings on February 20, 2003, and issue was joined on March 19, 2003. On July 9, 2001,

prior to the commencement of this action, plaintiff Desi Moore executed a release in favor of defendant Jamaica Buses Inc.

Defendants make the instant application to dismiss the complaint, pursuant to CPLR § 3211(a)(5), which states, in pertinent part: “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.” Further, New York General Obligations Law § 15-108(b) provides that, “[w]hen a release ... is given to one of two or more persons liable or claimed to be liable in tort for the same injury...it does not discharge any of the other tortfeasors from liability for the injury... unless its terms expressly so provide. (b) A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution...”

Here, plaintiff Moore executed a general release in favor of defendant Jamaica, for the consideration of \$675.33. The release that plaintiff Moore executed provides, in pertinent part, that upon receipt and acknowledgment of the aforementioned amount, plaintiff releases and forever discharges defendant Jamaica from the following:

any and all claims, demands, damages, actions, causes of action or suits at law or in equity, of whatsoever kind or nature, for or because of any matter of thing done, omitted or suffered to be done by said

Jamaica Buses Inc., prior to and including the date hereof, and particularly on account of all injuries both to person or property, resulting or to result from an accident which occurred on or about the 7th day of May, 2001.

Defendants therefore contend that because plaintiff Moore executed a valid general release in their favor, plaintiffs' are precluded from maintaining the instant action and the complaint should be dismissed.

In opposition, plaintiffs contend that since defendants do not raise this as an affirmative defense in their answer, and their time to make such as motion has elapsed, the defense is deemed waived and the motion should be denied. Moreover, plaintiffs assert that the release should be set aside because the result would be unjust in view of plaintiff Moore's injuries. They contend that the release only pertained to property damage, as evidenced by a May 31, 2001 letter from Michael Menegalli, defendants' Property Damage Examiner, who offered to reimburse plaintiff 50% of the total claim, to wit \$675.53 of \$1351.06. Moreover, plaintiff Moore contends that on July 9, 2001, she met with a representative of defendant Jamaica to discuss reimbursement for the damage sustained to her vehicle. She states that during the course of discussions she read a release that only pertained to property damage. Thereafter, she alleges that the representative left the room with the release, and upon the representative's return, she was asked to sign the release which she believed was the same document that she had just reviewed. Plaintiff Moore states that it was not until

months later that she realized that a fraud was perpetrated by the representative because she signed a document different from the one for property damages that she had read at the meeting. Thus, plaintiffs assert that the release should be set aside and the motion denied.

“It is well settled that releases are contracts whose interpretation is governed by principles of contract law. Where the language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed (see, Stone v. National Bank & Trust Co., 188 A.D.2d 865, 591 N.Y.S.2d 609; Metz v. Metz, 175 A.D.2d 938, 572 N.Y.S.2d 813; see also, Mangini v. McClurg, 24 N.Y.2d 556, 562, 301 N.Y.S.2d 508, 249 N.E.2d 386). A release will not be treated lightly, and will be set aside by a court only for duress, illegality, fraud, or mutual mistake (see, Mangini v. McClurg, supra; L & K Holding Corp. v. Tropical Aquarium at Hicksville, 192 A.D.2d 643, 596 N.Y.S.2d 468).” Cramer v. Newburgh Molded Products, Inc., 228 A.D.2d 541.

Here, plaintiffs contend that plaintiff Moore was fraudulently induced into signing the release that extinguished all of her rights, an allegation that is presumed to be true in view the application for a motion to dismiss, and defendants’ failure to interpose a reply to rebut that presumption. Arguendo, even if the allegations were not considered, still, “there is a requirement that a release covering both known and unknown injuries be “fairly and knowingly made” (id. at 566, 301 N.Y.S.2d 508, 249 N.E.2d 386, quoting Farrington v. Harlem Sav. Bank, 280 N.Y. 1, 4, 19 N.E.2d 657). This requirement may be applied in situations “falling far short of actual fraud” (id. at 568, 19 N.E.2d 657), such as when, “because the releasor has had little time for investigation or deliberation,

or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party" (Mangini v. McClurg, supra at 567, 301 N.Y.S.2d 508, 249 N.E.2d 386; see Best v. Yutaka, 90 N.Y.2d 833, 660 N.Y.S.2d 547, 683 N.E.2d 12; Curry v. Episcopal Health Servs., 248 A.D.2d 662, 663, 670 N.Y.S.2d 590; Horn v. Timmons, 180 A.D.2d 717, 718, 580 N.Y.S.2d 364; Starr v. Johnsen, 143 A.D.2d 130, 132, 531 N.Y.S.2d 589)." Haynes v. Garez, 304 A.D.2d 714. This scenario would seem to apply to the instant action as the release was signed only one month after the accident. More telling though is the nominal amount for which plaintiff Moore allegedly settled all her claims. Although small consideration is not necessarily indicative of the existence of those factors upon which a release should be set aside, as asserted by plaintiffs, "the amount paid here appears consistent with partial payment for property damage only (see Best v. Yutaka, supra; Curry v. Episcopal Health Servs., supra)." Haynes at 714. As such, it appears that foreclosure of plaintiff's personal injury claims was not contemplated, notwithstanding the all inclusive language of the release.

Moreover, even if the release was sufficient to serve as a complete bar to plaintiff Moore's action against defendant Jamaica, CPLR § 3211(e) states that an objection to the complaint based upon release is deemed waived unless it is asserted as an affirmative defense or in a motion prior to the interposition of a responsive pleading. As such, this post-answer motion for dismissal is untimely. Hanover Ins. Co. v. Finnerty, 225 A.D.2d 1054. Accordingly as there are undisputed allegations that the release was procured by fraud, as well as documentary evidence that the release was only for property damage, there are certainly equitable factors which compel this Court to set

aside the release with respect to the claims asserted herein. Thus, the release is therefore vacated with respect to plaintiff Desi Moore's claims for personal injury, and the motion to dismiss is denied.

Dated: August 11, 2003

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J.S.C.