

**Simmons v AAA Buffalo Development Corp.**

2003 NY Slip Op 30043(U)

May 5, 2003

Supreme Court, Suffolk County

Docket Number:

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

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**PRESENT:**

Hon. EDWARD D. BURKE  
Acting Justice of Supreme Court

Motion R/D : NONE - *Ex parte*  
Mot Seq # : 006 MD  
(PIP)

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ANNA MARIE SIMMONS and JEFFREY  
SIMMONS, JR., both infants under 14 years of age,  
by their parents and natural guardians, LISA MARIE  
SIMMONS and JEFFREY SIMMONS, and LISA  
MARIE SIMMONS and JEFFREY SIMMONS,  
individually,

Plaintiff(s),

- against -

AAA BUFFALO DEVELOPMENT CORP., AAA  
BUFFALO ONE DEVELOPMENT CORP.,  
LAWRENCE LOSCALZO, VICTOR PAFUNDI and  
JACKIE FHIMA,

Defendant(s).

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Upon the following papers numbered 1 to 3 read on this motion by adult plaintiffs for court approval of a proposed compromise; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this *ex parte* application (#006) by plaintiffs, Marie and Jeffrey Simmons, the parents of the infant plaintiffs, for an order approving compromises of the personal injury claims interposed in this action on behalf of the infant plaintiffs is considered under CPLR 1201, 1207 and 1208 and is denied for the reasons hereinafter set forth.

The movants commenced this personal injury action to recover damages, both direct and derivative, attributable to the personal injuries suffered by the infant plaintiffs due to a fire on premises owned, maintained or controlled by the defendants. Plaintiffs have received an offer to compromise the claims of the infants from the first four (4) defendants listed in the above caption in the total amount of \$460,000.00.

Out of said settlement monies, the movants propose to collect a cash payment of \$26,666.68, which shall be deposited in a local bank pursuant to CPLR 1206 and held for the use of *both infant plaintiffs*. However, the net balance is payable solely to Anna Marie Simmons upon her reaching

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the age of eighteen (18) years, with no payout on any of the principal to Jeffrey Simmons, Jr. at age eighteen (18) or otherwise.

The movants then propose that the insured defendant allocate the sum \$30,000.00 to the settlement of the claims of the infant plaintiff, Jeffrey Simmons, Jr., which shall be used to purchase a structured settlement annuity, paying out to Jeffrey Simmons, Jr. the following sums: \$15,000.00 on June 1, 2012; \$20,000.00 on June 1, 2015; and \$24,100.00 on June 1, 2018.

The remainder of the settlement monies, to wit: the sum of \$403,333.32 are allocated to the settlement of the claims of the infant plaintiff, Anna Marie Simmons. Movants propose that out of this sum, the plaintiffs' legal fees and a payback of an unidentified lien to the Department of Social Services be paid and, after deducting the cash payout of \$26,666.68 to be held for the joint use of both infant plaintiffs, the remaining amount be used for the purchase an annuity for Maria having a present value of \$200,000.00.

Neither the moving papers nor the proposed order include any references to the claims of the infant plaintiffs against defendant Fhima. Finally, the moving papers contain a purported "waiver" of the individual claims of the parents for their loss of services. However, the proposed order of compromise is silent with respect to the discontinuance of the parents' individual claims against one or all of the defendants.

The record reveals that the moving parents are without physical custody of the infant plaintiffs, both of whom are under the age of ten (10) years, due to the fact that both of said infant plaintiffs are in foster care at undisclosed locations. The movants thus appear to be parents without legal custody of the infant plaintiffs and, thus, without authority and/or capacity to further pursue the personal injury claims of the infant plaintiffs to their respective conclusions, be it by verdict or compromise (CPLR 1201, 1207).

It further appears from the record that the Suffolk County Department of Social Services, which might be an entity having legal custody of both infant plaintiffs, has asserted a lien of some type against the proceeds recoverable by infant plaintiff, Anna Marie Simmons. The nature and extent of the asserted lien is not, however, apparent from the moving papers.

The record also indicates that counsel for the moving plaintiffs and counsel for defendants AAA and Loscalzo agreed to a "high/low" settlement pending determination of an appeal by defendant Loscalzo of a denial of his motion for summary judgment dismissing the claims interposed in this action against him by the plaintiffs. The appeal was resolved in favor of Mr. Loscalzo and, accordingly, his insurer's offer of \$400,000.00 from the integral basis of the instant application with the other settling defendants offering the remaining settlement funds of \$60,000.00. There is, however, no evidence in the record indicating that the high/low settlement agreement was approved by the court. Accordingly, such an agreement may be disregarded upon this court's review of the merits of any proposed compromise.

The foregoing factual circumstances, discernable from the moving papers only after a thorough and extensive review thereof, give rise to legal issues regarding the propriety of this application. The standing of the movants is clearly in issue since they are without legal custody of

the infant plaintiffs (CPLR 1201). It further appears that the Suffolk County Department of Social Services, an entity which may have legal custody of the infant plaintiffs, may not serve as their CPLR 1201 representative in this action due to said department's assertion of a lien against the proceeds recoverable herein by the infant plaintiff Anna Marie Simmons. Finally, it appears that the children's best interests would be better served and promoted if they were represented in this action by independent CPLR 1201 representatives.

It is for the these reasons, that the court denies the instant motion for court approval of the proposed compromise of some of the claims interposed in this action by the infant plaintiffs. Such denial is, however, without prejudice to the interposition of further applications for the same or similar relief subsequent to the appearance herein of the new and separate CPLR 1201 representatives for each of the infant plaintiffs.

In view of the foregoing, it is further

**ORDERED** that, pursuant to CPLR 1202(a) ,the court hereby appoints Charles G. Eichinger, Esq., with offices located at No. 1 Suffolk Square, Suite 510, Islandia, New York 11749 and whose telephone number (631) 234-1666, as *guardian ad litem* for infant plaintiff, Anna Marie Simmons. The court further appoints David Fowler, Esq., with offices located at No. 114 Old County Road, Mineola, New York and a mailing address fo P.O. **Box** 855 Mineola, New York, 11501 and whose telephone number is (516) 741-16266, as *guardian ad litem* for the infant plaintiff, Jeffrey Simmons and it is further

**ORDERED** that each of the *guardians ad litem* herein appointed shall, upon acceptance of their fiduciary offices, file their consents to act and all other papers contemplated by CPLR 1202(c) and the rules at 22 NYCRR Part 36 with the fiduciary clerk within twenty (20) days after their receipt of this order. In the event that they are unwilling or otherwise unable to accept their appointments, the *guardian(s) ad litem* shall notify the court in writing; and it is further

**ORDERED** that all other proceedings in this action are stayed pending the appearances of the *guardians ad litem*, each of whom shall appear herein as *guardians ad litem* for their respective wards without retention of independent counsel in the absence of a further order of this court; and it is further

**ORDERED** that a conference shall be held herein on Thursday, June 19, 2003 at 10:30 a.m. in the Calendar Control Part of this court at which time counsel for all parties are directed to appear.

Proposed order of compromise is marked "*Not Signed*".

Dated: May 5, 2003.

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EDWARD D. BURKE, A.J.S.C.

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