

Rubert & Gross, P.C. v Kim

2007 NY Slip Op 32148(U)

July 11, 2007

Supreme Court, New York County

Docket Number: 0103660/2006

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

RUBERT & GROSS, P.C.,

Stakeholder

- v -

TIMOTHY KIM, YOUNG SOOK KIM,
DR. JONATHAN KORN and DR. ALI GUY,

Claimants.

INDEX NO. 103660/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers, numbered 1 to 4 were read on this motion to/for : vacate "so ordered" stipulation of settlement.

FILED
JUL 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is denied, for the reasons set forth below.

Background

The law firm of Rubert & Gross, P.C. brings this stakeholder action pursuant to CPLR 2601, to obtain a determination by the Court as to who is entitled to the sum of \$25,700, representing the net proceeds of the settlement of an underlying personal injury action held by the firm on behalf of claimants, Timothy and Young-Sook Kim (the Kims or claimants). Adverse claims have been asserted against the settlement proceeds by the Kims and two physicians, Dr. Jonathan Korn and Dr. Ali Guy (Affirmation of Richard Gross, Esq. in Opposition to Motion [Gross Aff. in Opp.], at 1).

The underlying personal injury action brought by the Kims, entitled *Kim v Mollica*, Kings

Co. Index No. 25059/90, was settled in May 1996 for the total amount of \$50,000, representing \$25,000 each for Mr. and Mrs. Kim, respectively (Affirmation of Michael A. Cervini, Esq. in Support of Motion [Cervini Aff. in Support], at ¶ 7 and Ex. A). Immediately prior to the settlement of the personal injury action, Rubert & Gross, P.C. had been retained as trial counsel by the Kims' attorney-of-record, Barry Siskin, Esq.¹ (Gross Aff. in Opp., at 2). The settlement checks were sent to Rubert & Gross, P.C., which was responsible for reaching the settlement, and were deposited into the firm's IOLA account (*id.*). Rubert & Gross, P.C. made distributions from the settlement proceeds for expenses and attorneys' fees incurred in connection with the prosecution of the personal injury action, in accordance with a list of expenses provided by the attorney-of-record, Mr. Siskin, as well as the applicable retainer agreement (Gross Aff. in Opp., at 3). The amount of the settlement proceeds remaining in the Rubert & Gross IOLA account, after the payment of expenses and attorneys' fees, was approximately \$25,700, divided between Mr. and Mrs. Kim (*id.*). Mr. Siskin informed Rubert & Gross, P.C. that Dr. Korn and Dr. Guy had asserted substantial liens on the proceeds of the settlement and, thus, the law firm was unable to distribute the remainder of the proceeds to the Kims until these liens were resolved (*id.*).

Rubert & Gross, P.C. brought this stakeholder action to have the Court determine how the remaining settlement proceeds of \$25,700 should be distributed to the Kims and the two physicians with liens, Dr. Korn and Dr. Guy (Gross Aff. in Opp., at 3). The stakeholder action was commenced by filing a summons with notice, dated March 16, 2006. The notice clearly stated that the amount of the net settlement proceeds remaining in the escrow account of Rubert & Gross, P.C. was \$25,700 (Gross Aff. in Opp., Ex. A).

On January 17, 2007, the attorneys for the parties appeared before Hon. Ira Gammerman

¹ Claimants point out that Barry Siskin, Esq. has been formally admonished by the Departmental Disciplinary Committee of the First Judicial Department for violating certain provisions of the Code of Professional Responsibility, by failing to properly pursue no-fault arbitration in connection with the underlying personal injury action and failing to satisfy the outstanding medical liens on the settlement of that action (Cervini Aff. in Support, Ex. B). The disciplinary proceedings against Mr. Siskin, however, are not relevant to the instant stakeholder action.

and entered into a stipulation, which was so-ordered by the Court, resolving the instant stakeholder action (Gross Aff. in Opp, at 4; Cervini Aff. in Support, Ex. C). The stipulation provided that the claim of Dr. Jonathan Korn was resolved for the amount of \$900, and the claim of Dr. Ali Guy was dismissed, with prejudice² (Cervini Aff. in Support, Ex. C). In accordance with the stipulation on or about February 5, 2007, Rubert & Gross, P.C. provided to the attorney for the Kims a detailed accounting of the distribution of the expenses previously paid from the proceeds of the personal injury action settlement (Gross Aff. in Opp., Ex. C). After deducting the expenses previously paid and the amount of \$900 paid to Dr. Korn pursuant to the so-ordered stipulation, the accounting letter indicated that the net amount of \$12, 873.84 was payable to Timothy Kim and the net amount of \$11,927.56 was payable to Young-Sook Kim (*id.*). In a letter dated February 16, 2007, Mr. Gross enclosed two certified checks for the above amounts payable to Mr. and Mrs. Kim, as well as a list of the attorneys' fees paid from the settlement proceeds and the closing statement filed with the Office of Court Administration (Gross Aff. in Opp., Ex. D).

Discussion

The Kims have moved to vacate the so-ordered stipulation of settlement, asserting that there is no proof to substantiate the expenses paid from the proceeds of the settlement of the personal injury action and there must be a full hearing regarding these expenses. The claimants have not, however, established any basis to vacate the settlement.

The stipulation between the attorneys for the parties, which was so-ordered by the Court, constitutes a binding agreement pursuant to CPLR 2104. As the Court of Appeals has stated:

“Stipulations of settlement are favored by the courts and not lightly cast aside ... This is all the more so in the case of ‘open court’ stipulations ... within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during

² Although the so-ordered stipulation stated that Dr. Guy had failed to appear at the court proceeding, the attorney for Dr. Guy agreed to a stipulation discontinuing his claim, with prejudice (Gross Aff. in Opp, Ex. F).

litigation.”

(*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; see also *Hawkins v City of New York*, 40 AD3d 327 [1st Dept 2007]; *Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 [1st Dept 2006]; *City of New York v 130/40 Essex St. Dev. Corp.*, 302 AD2d 292, 293 [1st Dept 2003]).

The claimants have failed to establish that the so-ordered stipulation was the product of fraud, collusion, mistake or accident. Nor have claimants demonstrated the existence of any of the grounds for relief from a court judgment or order pursuant to CPLR 5015 (a), including excusable default, newly discovered evidence, fraud or misrepresentation, lack of jurisdiction or reversal of a prior judgment or order. Claimants’ assertion that the expenses previously paid from the settlement proceeds are unsubstantiated, does not justify vacating the so-ordered stipulation. Claimants were aware, based upon the summons with notice, that Rubert & Gross, P.C. only had the amount of \$25,700, out of the total settlement proceeds of \$50,000, on deposit in the firm’s escrow account for distribution when this action was commenced in or about March 2006. Claimants had the opportunity to seek disclosure, if they wanted information concerning the amount of the expenses and attorney’s fees previously paid from the settlement proceeds. Further, as Mr. Gross indicates, his firm paid the expenses from the settlement proceeds in accordance with directions provided by Barry Siskin, Esq., the attorney-of-record for the Kims in the personal injury action (Gross Aff. in Opp., at 3, 8). Therefore, any challenges concerning the amount of the expenses previously paid from the settlement proceeds must be directed at Mr. Siskin. Claimants have failed to demonstrate any grounds for vacating the so-ordered stipulation, which resolved the instant stakeholder action and authorizes the distribution of the net proceeds of the settlement of the underlying personal injury action after more than a decade.

Accordingly, it is


ORDERED that the motion by claimants Timothy and Young-Sook Kim to vacate the so-ordered stipulation of settlement is denied; and it is further

ORDERED that, within 30 days of entry, Rubert & Gross, P.C. shall serve upon all parties

to this action, a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 7/11/07

ENTER: 
Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if Appropriate: DO NOT POST REFERENCE

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