

Rodriguez v Saal

2007 NY Slip Op 33586(U)

October 25, 2007

Supreme Court, New York County

Docket Number: 0113392/2004

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

ELENA ALICEA RODRIGUEZ, as Administratrix
of the Goods, Chattels and Credits which
were of JUAN RODRIGUEZ, Deceased, and
ELENA ALICEA RODRIGUEZ, Individually,

Plaintiffs,

-v-

Index No.: 113392/04
MOTION DATE _____
MOTION SEQ. NO. 6
MOTION CAL. NO. _____

STUART SAAL, M.D., JOHN WIGNESWARAN, M.D.,
KAPUR SANDIP, M.D., TIGIST HAILY, M.D.,
MICHAEL T. WAYANT, M.D., DESMOND BURKE,
M.D., LEE RICHARDSON, M.D., ROXANA BOLOGA,
M.D., NIESHA MHASKAR, M.D., MANIKKAM
SUTHANTHIRAN, M.D., DARSHANA DADHANANIA,
M.D., CHOLI HARTONO, M.D., SUSAN KIM, M.D.,
"JOHN" BERLIN, M.D., (first name being
fictitious and unknown), YONG-HO AUG, M.D.,
RAGUPATHY BALLACHANDER, M.D., SIMMONS
KHALMANI, M.D., NEW YORK ORGAN DONOR NETWORK,
"JOHN DOE" (first and last name being
fictitious and unknown but intended to
represent the Transplant Coordinator at the
New York Organ Donor Network), "SCREENING
HOSPITAL" (name being fictitious and unknown
but intended to represent the screening
Hospital of the organ transplanted to
plaintiff's decedent on 2/24/02), THE ROGOSIN
INSTITUTE and NEW YORK PRESBYTERIAN HOSPITAL
WEILL CORNELL CAMPUS,

Defendants.

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NEW YORK
COUNTY CLERK'S OFFICE

The following papers, 1-15, were read on this motion by defendants New York Organ Donor Network, Inc., and its employees, officers and directors s/h/a "John Doe" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the New York Organ Donor Network) to dismiss, pursuant to CPLR 3211(a)(5) and GOL 15-108, on the ground of release.

Papers Numbered

Notice of Motion /Order to Show Cause - Affidavits - Exhibits
 Affirmation In Opposition
 Replying Affidavits - Exhibits

1-5
6-11
12-15

Cross-Motion: Yes No

The instant medical malpractice action was brought against the Rogosin Institute, New York Presbyterian Hospital, the New York Organ Donor Network (the "Network"), St. Luke's Hospital, which was originally designated as the "Screening Hospital", and eighteen individual physicians, each one of whom, the plaintiffs alleged, had some affiliation with an institutional defendant. The crux of plaintiffs' complaint is that the defendants negligently transplanted the cancerous cadaveric kidney into the decedent, causing the decedent to acquire the malignant cancer that metastasized to most of his major organs, and ultimately resulted in his death.

By Order, dated December 15, 2005, this court, among other things, granted the Network's motion to dismiss the complaint, as asserted against it, as time barred and denied those portions of plaintiffs' motion which sought an extension of time to effect service of process upon the Network. Thereafter, plaintiffs appealed from the aforementioned decision. While plaintiffs appeal was pending before the Appellate Division, First Department, counsel for plaintiffs and counsel for defendants Rogosin Institute, New York Presbyterian Hospital and the individual physicians, engaged in extensive settlement negotiations, in which this court assisted. On February 23, 2007, counsel for plaintiff and the remaining defendants went on the record before this court, and stated the action against these defendants had been settled for the amount of \$750,000, which was to be paid by defendant New York Presbyterian Hospital. Plaintiffs' counsel stated on the record that the settlement was in no way intended to effect the appeal relating to New York Organ Donor Network.

Thereafter, plaintiffs executed a release with New York Presbyterian Hospital as the releasee. The release set forth the following:

"This release and settlement constitutes complete payment for all damages and injuries and is specifically intended to release the RELEASEE and is also specifically intended to release, whether presently known or unknown, all other tortfeasors liable or claimed to be liable jointly with the RELEASEE; and whether presently known or unknown all other potential or possible tortfeasors liable or claimed to be liable jointly with the RELEASEE."

By decision, dated August 2, 2007, the Appellate Division, First Department, reversed this court's order of December 15, 2005, and reinstated the complaint as against the Network. The Network, as well as the employees, officers and directors of the Network s/h/a "John Doe" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the New York Organ Donor Network) now move to dismiss the action as asserted against them

on the ground of release, pursuant to CPLR 3211(a)(5) and GOL 15-108. According to movants, the release executed by plaintiff released the claims against all tortfeasors, and, thus, dismissal of the claims against all tortfeasors, which includes movants, is warranted, pursuant to GOL 15-108.¹ In opposition, plaintiffs argue that, *inter alia*, the intent of the releasing party is controlling when interpreting agreements compromising actions against other persons liable for the injury. According to plaintiffs, it was made clear throughout the course of settlement negotiations that any settlement would not release the Network.

It is well settled that where there is no mistake with respect to an agreement reached between parties, except for an error in the instrument that embodies the agreement, equity will step in and reform the instrument, rather than enforce the instrument in its mistaken form. See *Born v. Schrenkeisen*, 110 NY 55 [1888]; *Ebasco Constructors, Inc., v. Aetna Insurance Co.*, 260 AD2d 287 [1st Dept. 1999]; *Baby Togs, Inc. v. Harold Trimming Co.*, 67 AD2d 868 [1st Dept. 1979]. However, to overcome the heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties, evidence of a very high order is required. See *George Backer Management Corp. v. Acme Quilting Co.*, 46 NY2d 211 [1978].

Accordingly, equity requires the court to conduct a hearing, during which plaintiffs will be required to offer adequate proof to demonstrate that the agreement entered into between plaintiffs and New York Presbyterian Hospital was not intended to release the Network, despite the fact that the language used in the written instrument releases all other tortfeasors. Because the court assisted during the settlement negotiations, there exists the possibility that the court may be called upon to provide evidence with respect to those negotiations. Therefore, the hearing will be referred to J.H.O. Ira Gammerman, who will, with the consent of the parties, preside over the proceeding, or assign the hearing to a Judge of the Supreme Court.

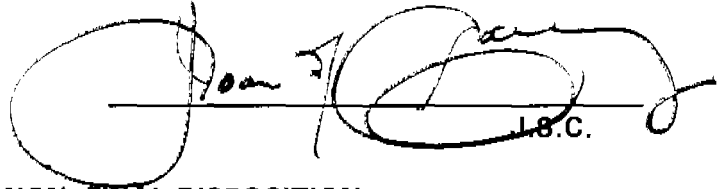
Based on the foregoing, it is hereby

ORDERED that defendants New York Organ Donor Network, Inc., and its employees, officers and directors s/h/a "John Doe" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the New York Organ Donor Network) motion to dismiss is denied, without prejudice, with leave to renew following the hearing discussed above; and it is further

¹ GOL 15-108(a) sets forth that "[w]hen a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for 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 expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest." (emphasis added)

ORDERED that all parties appear before J.H.O. Ira Gammernan on December 3, 2007 so that a hearing may be conducted with respect to the issue presented herein and that plaintiffs be prepared to present evidence on such issue.

Dated: 10/25/2007


J.H.O. L.S.C.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

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