

<b>Ortiz v Mastromarino</b>
2008 NY Slip Op 30206(U)
January 23, 2008
Supreme Court, New York County
Docket Number: 0119139/2002
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. Eileen Bransten  
Index Number : 119139/2002

PART 6

ORTIZ, ANA L.

vs

MASTROMARINO,, MICHAEL D.D.S.

Sequence Number : 002

MONEY JUDGMENT

INDEX NO. 119139/02  
MOTION DATE 11/13/07  
MOTION SEQ. NO. 02  
MOTION CAL. NO. 05

The following papers, numbered 1 to 2 were read on this motion to/for enforce settlement

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-23-08

Eileen Bransten

HON. EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

-----X  
ANA L. ORTIZ,

Plaintiffs,

-against-

MICHAEL MASTROMARINO, D.D.S., FACIAL  
TRAUMA CONSULTANTS, LLC., THE INSTITUTE  
FOR DENTAL IMPLANTS AND RECONSTRUCTIVE  
SURGERY, FACIAL TRAUMA CONSULTANTS OF  
NEW YORK, P.C., MICHAEL MASTROMARINO,  
D.D.S., P.C., and HOSPITAL FOR JOINT DISEASES,

Defendants.  
-----X

PRESENT: EILEEN BRANSTEN, J.

Index No. 119139/02  
Motion Date: 11/13/07  
Motion Seq. No.: 02

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Pursuant to CPLR 5003-a, plaintiff Ana L. Ortiz ("Ms. Ortiz") moves for entry of judgment against defendant Michael Mastromarino, M.D. ("Dr. Mastromarino"). Dr. Mastromarino does not oppose the motion.\* Because an enforceable settlement was not obtained, the motion is denied.

Background

On February 28, 2006, Dr. Mastromarino's counsel wrote Ms. Ortiz's attorney:

"Please allow this letter to confirm our recent telephone conversations concerning the above matter. Our client Michael Mastromarino, has authorized us to offer the total sum of \$50,000.00 in full and complete settlement of this claim. It is understood that \$25,000 of this amount is [to] be paid 'up front' with the balance of \$25,000 to be paid over 18 months.

\_\_\_\_\_  
\* Defendant NYU Hospital Center (successor by merger to defendant Hospital for Joint Diseases Orthopedic Institute s/h/a Hospital for Joint Diseases), which settled with Ms. Ortiz and already paid her in full, submits papers to clarify that it is not the target of this motion.

“The settlement will of course be subject [to] execution and exchange of appropriate closing documents including [a] stipulation of discontinuance and a general release. Under the circumstances, we must also request that you and your client execute a confidentiality agreement concerning the settlement.”

Affidavit in Support (“Supp.”), Ex. G (emphasis added).

In March, Ms. Ortiz executed settlement paperwork and sent it to defense counsel. Supp., Exs. D and E. There is no indication that a confidentiality agreement was forwarded. Ms. Ortiz’s papers, in contrast to Dr. Mastromarino’s, set forth that pursuant to “CPLR Section 5003-a \* \* \* all sums due are payable within twenty-one (21) days of your receipt of the enclosed documents.” Supp., Ex. F.

Defense counsel never signed the papers and a settlement was not finalized.

Ms. Ortiz now moves pursuant to CPLR 5003-a (“Prompt payment following settlement”) “to enter judgment.” Supp., at ¶ 2. Because there can be no relief pursuant to CPLR 5003-a, her unopposed motion must be denied.

#### Analysis

CPLR 2104 provides that an “agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and

notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.”

In *Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 286 (2004), the Court of Appeals made plain that to be binding the settlement agreement “itself must be in writing signed by the party (or attorney) to be bound.” The Court further elaborated that “to be enforceable under CPLR 2104 an out-of-court settlement must be adequately described in a signed writing.” *Id.*; see also, *DeVita v. Macy’s East, Inc.*, 36 A.D.3d 751 (2d Dept. 2007) (confirmatory email “did not constitute a writing sufficient to bring the purported settlement into the scope of CPLR 2104”); *Barrett v. Carela*, 33 A.D.3d 830 (2d Dept. 2006) (evidence did not include a “signed writing incorporating all material terms of the purported settlement”).

Here defense counsel’s signed letter to Ms. Ortiz’s attorney sets forth the amount of the settlement offer and its proposed payment terms. Defense counsel, however, clearly contemplated an exchange and execution of documents--including a confidentiality agreement--before finalization. The documents Ms. Ortiz’s attorney sent back to Dr. Mastromarino’s counsel, moreover, were not consistent with the proposed payment terms, reflecting plaintiff’s expectation that payment would be made within 21 days. Neither defense counsel nor defendant ever signed off on a stipulation of discontinuance or definitively agreed to be bound simply by sending the February 28,

2006 letter. *Contrast, Davidson v. Metropolitan Transit Auth.*, 44 A.D.3d 819 (2d Dept. 2007) (“subsequent letter written by the plaintiff’s attorney on behalf of the party to be bound confirmed the essential terms of the oral settlement agreement reached at the pretrial conference and was a subscribed writing sufficient to satisfy the requirements of CPLR 2104”) (emphasis added). A fully executed stipulation of discontinuance was never filed with the county clerk.

Because the matter was not finally settled, CPLR 5003-a does not provide Ms. Ortiz with recourse. *See*, CPLR 5003-a (“When action to recover damages has been settled, any settling defendant \* \* \* shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff”) (emphasis added); *see also, Sealey v. Jamaica Buses, Inc.*, 39 A.D.3d 526, 527 (2d Dept. 2007) (plaintiff entitled to enter judgment pursuant to CPLR 5003-a upon submitting proof that “she tendered a duly executed release and stipulation of discontinuance \* \* \* following the settlement entered into by the parties on the record in open court”) (emphasis added).

Accordingly, it is

ORDERED that Ms. Ortiz’s motion is denied; and it is further

ORDERED that the parties are to appear for trial on February 25, 2008, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
January 23, 2008

ENTER

  
Hon. Eileen Bransten

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE