

Gromko v Berezin

2008 NY Slip Op 30818(U)

March 17, 2008

Supreme Court, New York County

Docket Number: 0105640/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Gromko, S

INDEX NO. 105640/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

Berezni R

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 24 2008

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

The parties are hereby directed
to appear for a preliminary
conference on May 22, 2008 at
9:30 a.m.

Dated: 03/17/08

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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 10

SARAH GROMKO,

Plaintiff,

-against-

ROBERT BEREZIN and ROBERT LEWIS,

Defendant.

Decision/Order

Index No.: 105640/07

Seq. No. : 001, 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Motion Seq. 001 - Papers

Def RL motion (dismiss), JBC affid, memo 1

Pltf xmot (sj, sanctions), SG affid, memo 2

Pef RL reply, RL affid, JBC affid, memo 3

Pltf memo in further support 4

Motion Seq. 002 - Papers

Def RB motion (dismiss), GB affirm 1

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In this action, plaintiff alleges that her former landlord, Robert Berezin ("Berezin"), sexually harassed and discriminated against her, in violation of her rights under the New York State Human Rights Law, N.Y. Executive Law § 290 et seq.; the New York City Civil Rights Law, New York City Administrative Code § 8-107 et seq.; and the New York Civil Rights Law § 40-c. Plaintiff also asserts claims against defendant Robert Lewis ("Lewis") based on the allegation that he was a general partner in the partnership which owned the building in which she resided, and because he allegedly knew or should have known of Berezin's unlawful conduct.

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Defendant Robert Lewis moves, pre-answer, to dismiss the complaint on the ground that plaintiff signed a valid and enforceable agreement releasing defendants from the claims she makes in this action (sequence number 001). CPLR § 3211(a)(1) and (5). Defendant Berezin separately moves, pre-answer, to dismiss the complaint based on the same ground of release (sequence number 002). Plaintiff cross-moves for: (a) an order striking or dismissing any defense based on prior release, or alternatively, for summary judgment in her favor on this defense pursuant to CPLR § 3212; and (b) the imposition of sanctions against defendant Lewis for allegedly engaging in frivolous conduct pursuant to 22 NYCRR 130.1-1.

Since the motions and cross motion are responsive to each other, they are hereby consolidated for consideration by the court.

Since neither defendant has answered the complaint, summary judgment relief is not available to plaintiff. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). Therefore, to the extent that plaintiff seeks summary judgment dismissing defendants' defense based on prior release, in her cross motion, that cross motion will be treated as opposition to each motion-in-chief.

Relevant Undisputed Facts

Plaintiff Sarah Gromko resided in apartment #5 in a residential building located at 318 6th Street, Brooklyn, New York 11215 (the Building) pursuant to a written lease agreement from July 2001 to on or about February 28, 2006. At the time, the Building was owned by defendants Berezin and Lewis as tenants in common. Plaintiff alleges that she was sexually harassed and discriminated against by Berezin when she resided in the Building. She alleges that on one occasion in February or March of 2005, he

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forced himself on her and grotesquely kissed her in the hallway of her own apartment. After she refused his advances and pushed him away, defendants then allegedly retaliated against her by refusing to make repairs to the apartment. Plaintiff alleges that, on information and belief, defendants rented the apartments in the Building disproportionately to young single women, whom Berezin then preyed on by sexually harassing them in a similar fashion. She further alleges that although she complained about Berezin's behavior to Lewis, he did nothing.

Plaintiff filed this action on April 26, 2007. Plaintiff alleges three causes of action against both defendants. Her first cause of action alleges that both defendants violated Executive Law § 296(5)(a)(2), which makes it an unlawful discriminatory practice for the owner or managing agent of a housing accommodation to discriminate on the basis of sex. Plaintiff's second cause of action is based on the alleged violation of N.Y. Civil Rights Law § 40-c, which provides that "[n]o person shall, because of . . . sex . . . be subjected to discrimination in his or her civil rights, . . . by any other person." The third cause of action alleges that both defendants violated New York City Admin. Code § 8-107(5)(2), which provides that it shall be an unlawful discriminatory practice for the owner or managing agent of a housing accommodation to discriminate against tenants on the basis of their gender.

The release upon which defendants rely was executed in connection with a non-payment of rent proceeding commenced by the defendants against plaintiff in December 2005, after plaintiff had stopped paying her rent in October of that year. Lewis, who is also an attorney, commenced an action against plaintiff on behalf of himself and Berezin in the Civil Court of the City of New York, County of Kings, Housing

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Part to dispossess plaintiff of the apartment and obtain a judgment for the back rent owed.

By letter dated December 12, 2005, plaintiff responded to the non-payment petition, claiming, inter alia, that the rent for the apartment was too high for her since she had been unemployed for six months and her roommate had left, and that she was requesting a decrease in her rent since various listed repairs she had previously requested had not been made. Lewis denies that he had any knowledge, prior to the institution of the non-payment proceeding, that plaintiff believed the apartment required repairs.

On the return date of the petition, January 17, 2006, plaintiff requested more time to find an attorney, which was granted and the matter was adjourned to January 31, 2006. Plaintiff alleges that, at some point during this initial court appearance, she told Lewis that "he must know perfectly well what Berezin was up to -- that he was inappropriate with his female tenants." Gromko Aff. ¶ 13. She claims that Lewis was dismissive of her claims, and basically accused her of lying. Lewis denies that plaintiff ever advised him of her sexual harassment claims at this point in time.

Plaintiff alleges that she then sought advice from "an advocacy organization and people familiar with harassment and discrimination" about her claims. Gromko Aff. ¶ 15. She claims that "[m]y understanding was that I could still pursue these issues in court if I settled by rent case, as long as I avoided signing a broad release. I understood that if I signed anything at all, it should be limited to the landlord-tenant and rent issues that had been raised in housing court." Id.

At the second court conference held on January 31, 2006, plaintiff was ordered

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to deposit three months rent with the court by February 7, 2006, and to continue to pay her monthly rent in the amount of \$1,548.90. Trial was scheduled on February 21, 2006.¹

Thereafter, plaintiff sent Lewis a letter dated February 3, 2006, in which she set forth a proposal to settle the non-payment proceeding. In this letter, plaintiff offered to vacate the apartment by March 1, 2006 if defendants agreed to: (i) waive the rent for February 2006 (\$1,548.90); (ii) apply the \$1,548.90 security deposit to cover the rent for January 2006; and (iii) accept payment of the remainder of the rent owed for October 2005 (\$1,382.70), November 2005 (\$1,548.90) and December 2005 (\$1,548.90) over the period of three years. Basically, plaintiff agreed to forgo her one-month security deposit and pay defendants \$4,480.50. After reviewing the letter, Lewis inserted two additional sentences, signed it to signify his acceptance, and sent it back to plaintiff.

The language he inserted is:

The parties release each other from all liabilities and claims, other than [sic] those contained in this Agreement. The lease is terminated and the tenant waives any and all claims for repairs or rent overcharges.
[signature of Robert Lewis]

Gromko Aff., Exh. 4 thereto.

When plaintiff received the letter back from Lewis, she called to ask why he inserted this language. She claims that Lewis was extremely aggressive, shouted at her in response, basically saying that she had better agree to this new language or else

¹In addition, the housing court judge signed an order requiring the New York City Department of Housing Preservation and Development (HPD) to conduct an inspection of the apartment. That inspection took place on February 6, 2006. Defendants contend, and plaintiff does not deny, that HPD's inspection order found that there was "no cause for complaint" for each of the items about which plaintiff had complained.

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they would have to go back to court, where he would get whatever he wanted, and ended the conversation abruptly. Defendant Lewis agrees that plaintiff telephoned him to ask why he inserted the two new sentences. He claims that he calmly told her that he added the language because he wished for their relationship to be completely severed so that there would be no further lawsuits, and added that without such language, he would not proceed with the settlement.

Plaintiff and Lewis appeared in housing court on February 21, 2006. Prior to the case being called, Lewis claims that plaintiff, for the first time, mentioned to him her allegations concerning inappropriate conduct by Berezin, but refused to provide him with any details. He claims he urged her to tell her complaints directly to the housing court judge.

When the case was called, the parties were referred to a court attorney. The parties dispute as to what was discussed before this gentlemen. Plaintiff contends that she explained to the court attorney that they had come to an agreement, but that Lewis was backing out of it because she did not want to agree to his broad release language. Lewis allegedly insisted that the clerk use broad release language so that all claims of any kind be released. But plaintiff claims she resisted, remembering what the advocacy organization had told her. She also contends that the court attorney agreed with her, and said that the release could only be about things that were addressed by the housing court proceeding. Eventually, she claims that Lewis said something to the effect that "if I'm not going to get a general release, that I'm going to insist on getting more money." Gromko Aff. ¶ 19. Because Lewis was being aggressive and she "just wanted to get out of there," she contends that Lewis did indeed get more from her that

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the original deal, and that she ended up agreeing to paying defendants \$6,029.40 -- instead of \$4,480.50 as set forth in the February 3rd letter. Id.

The parties do agree that the court attorney drafted a Stipulation of Settlement (the Stipulation), which they both signed. The Stipulation reads in full:

The parties agree as follows: Petition amended to date. The parties agree that \$7578.30 is owed through Feb. '06.
Final Judgment of Possession in favor of Petitioner. Warrant to issue forthwith, execution stayed through March 1, 2006.
Landlord agrees to apply security deposit towards arrears -- leaving a balance owed of \$6029.40. Respondent agrees to pay arrears off over 36 month
March 1 '06 - through March '09 @ 167.48/month.
Respondent + Petitioner release each other as to all claims arising out of the Landlord-Tenent relationship.
Final money Judgment in Favor of Petitioner for \$6029.40. Respondent to surrender keys & receive dated receipt for keys upon vacating Apt. to be left free of all persons & property any property left deemed abandoned. Petitioner to provide Respondent with satisfaction of Judgment upon payment in full.

Courtian Aff., Exh. D thereto (emphasis added).

Plaintiff contends that, after the court attorney drafted the Stipulation and asked both of them to read it, she "read it over and stressed to the court attorney that the release was narrow, and that specifically [she] had a sexual harassment claim that [she] might need to raise in court." Gromko Aff. ¶ 22. The court attorney allegedly responded that the language of the Stipulation was definitely just about her owing rent, was not about sexual harassment, and that the housing court was only for specific things like nonpayment and eviction.

Defendant Lewis disputes this rendition of the events in housing court. He contends that despite his urging that plaintiff raise her allegations about Berezin's alleged behavior first with the judge and then with the court attorney, plaintiff did not do

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so. Lewis avers that since the plaintiff had refused to submit to the prior settlement agreement as written, he insisted on getting more rent money. During the negotiations in front of the court attorney, although Lewis stated that he required a release in connection with any settlement reached, the court attorney never stated that broad release language was not appropriate and that the parties never discussed the actual release language provision.

Plaintiff and defendant Lewis then appeared before the Hon. Maria Ressos, who entered a decision and judgment in the amount of \$6,029.40 against plaintiff and in favor of defendants based on the Stipulation. Again, the parties dispute as to what was discussed before Judge Ressos. Plaintiff contends that she told the judge it was her understanding that the agreement was only about her failure to pay rent, and that any claims she had over any kind of sexual harassment would be separate from this. Plaintiff contends that the judge either nodded her head or actually said that this was correct or in some way acknowledged that she had heard plaintiff and did not disagree, and that defendant Lewis did not voice any disagreement with the plaintiff in front of the judge. Defendant Lewis denies that plaintiff ever mentioned any sexual harassment by Berezin in front of Judge Ressos, that plaintiff did not question the breath of the release language, and that the judge did not do or say anything to indicate that the release language was limited. Rather, he contends that the judge "told us that this ended the case and our relationship and that it was final." Lewis Aff. ¶ 33.

Both defendants argue that all three claims in this lawsuit must be dismissed as a matter of law pursuant to CPLR 3211(a)(1) and (5) because the plain and unambiguous language of the Stipulation is that plaintiff released defendants from "all

claims arising out of the Landlord-Tenant relationship," and the allegations against defendants in this action, sounding in sexual harassment and housing discrimination, are statutory claims which spring solely and directly from the landlord-tenant relationship.

In opposition to defendants' motions, plaintiff argues that because the non-payment lawsuit was a summary proceeding in New York City Civil Court and plaintiff's sexual harassment and civil rights law claims could not be brought in that court, the Stipulation cannot, as a matter of law, be read to include a release of her current claims. Plaintiff further argues that the phrase "arising out of the Landlord-Tenant relationship" in the Stipulation is and was intended to be limited and narrow, and that she understood the release to be limited to claims relating to the payment of rent, surrender of the apartment, and the method and logistics of plaintiff's departure, i.e., the matters addressed in the Stipulation and the housing court proceeding. Plaintiff also alleges that Lewis had agreed to settle the non-payment proceeding for \$4,480, and that only when she balked at signing a more broadly-worded release, Lewis insisted on payment of an additional month's rent. Thus, she argues that she received no additional consideration to release her sexual harassment and discrimination claims. Finally, plaintiff urges the court to take into account her pro se status in housing court in determining whether her interpretation of the release language is reasonable.

Discussion

'[I]t is firmly established that a valid [release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties.'" Skluth v United Merchants & Mfrs., Inc., 163 AD2d 104,

106 (1st Dept 1990), quoting Appel v Ford Motor Co., 111 AD2d 731, 732 (2d Dept 1985). "The meaning and extent of coverage of a release 'necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given.'" Rotondi v Drewes, 31 AD3d 734, 735-36 (2d Dept 2006), quoting Cahill v Regan, 5 NY2d 292, 299 (1959); see also Apfel v Prestia, 41 AD3d 520, 521 (2d Dept 2007) (where "[i]f from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demand or obligations, the instrument will be operative as to those matters alone [citations omitted]."). "Furthermore, 'a release may not be read to cover matters which the parties did not desire or intend to dispose of.'" Morales v Solomon Mgt. Co., LLC, 38 AD3d 381, 382 (1st Dept 2007), quoting Cahill v Regan, 5 NY2d at 299.

A release, like any contract, must be "read as a whole to determine its purpose and intent," and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous. W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 (1990); see also Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 181 (1st Dept). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" Greenfield v Philles Records, Inc., 98 NY2d 562, 569-570 (2002), quoting Breed v Insurance Co. of N. Am., 46 NY2d 351, 355 (1978).

The fact that the release at issue was entered into in connection with a non-payment proceeding in Civil Court and that court, being a court of limited jurisdiction,

may not have had jurisdiction over plaintiff's current civil and human rights claims,² does not serve to preclude, as a matter of law, enforcement of the release in the Supreme Court. This is because, as stated above, a release is a contract and is governed by principles of contract law. Mangini v McClurg, 24 NY2d 556, 562 (1969); Kaminsky v Gamache, 298 AD2d 361 (2d Dept 2002); Goode v Drew Bldg. Supply, Inc., 266 AD2d 925 (4th Dept 1999). Very often releases are entered into where litigation is only contemplated or threatened. The fact that plaintiff did not and could not litigate her civil and human rights claims in the non-payment proceeding does not preclude enforcement of the release if the language of the release clearly and unambiguously applies to such claims. However, the extent of coverage of the release language of the Stipulation must take into account that the controversy being settled was a non-payment proceeding in housing court, and that none of the claims plaintiff asserts herein had been interposed in that proceeding.

The release at issue is clearly not a broad general release, and many of the cases upon which defendants rely are thus clearly distinguishable. See, e.g., Rubycz-Boyar v Mondragon, 15 AD3d 811 (3d Dept 2005) (release of all claims or actions tenant ever had "by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this [r]elease" precluded medical

²In Smalkowski v Vernon (2001 WL 914248 [Civ Court, Kings County 2001]), cited by plaintiff for the proposition that the Civil Court lacked jurisdiction to hear her housing discrimination claims, the tenant's race and disability-based discrimination counterclaims were not dismissed for lack of jurisdiction. Rather, since possession of the apartment was no longer at issue, the court merely declined "to exercise such ancillary or pendent jurisdiction as it may have" to adjudicate the tenant's counterclaims alleging violations of the New York Executive Law and the New York City's Administrative Code.

malpractice claim); Sibersky v Borah, Goldstein, Altschuler & Schwartz, P.C., 2002 WL 1610923, at *5 (SD NY July 22, 2002) (where former tenants granted landlord and its agents "a complete and general release of all claims arising from the beginning of time to date," in connection with the settlement of holdover proceedings in which tenants had asserted a counterclaim for housing discrimination, then pending but separate lawsuit alleging housing discrimination was barred by the release).

Rather, the language of the Stipulation limits the types of claims released to "all claims arising out of the Landlord-Tenant relationship." In this court's view, this language is ambiguous because, taking into account the controversy being settled, the purpose for which a release was given and plaintiff's pro se status in the housing court proceeding, it is reasonably susceptible of the meaning to which plaintiff ascribes, to wit, that it was a limited release intending only to cover the issues raised in the non-payment proceeding such as rent, repairs, and her surrender of the apartment. This language is also susceptible, as defendants argue, of encompassing any claim of whatever nature arising out of the parties' former status as landlord and tenant, including statutory housing discrimination claims. Accordingly, the extrinsic evidence regarding its execution, which raise many factual issues dependent on the credibility of the parties and others, must necessarily be considered in determining the intent of the parties.

Defendants rely on Goode v Drew Bldg. Supply, Inc. (266 AD2d 925, supra), where the plaintiff was barred, on summary judgment, from suing for age discrimination under the Executive Law based on the release that he signed, without benefit of counsel, at the termination of his employment. However, the broadly-worded release in

that case specifically released his former employer from age discrimination claims under the Executive Law, and thus the courts properly rejected the plaintiff's claim that he did not understand this plain and unambiguous release.

Another case on which defendants rely is Skluth v United Merchants & Mfgs., Inc. (163 AD2d 104 [1st Dept 1990]), where a release in which the plaintiff therein agreed to "release and forever discharge [his employer] from all liability of every kind, nature and description" arising out of his employment was held to preclude a subsequent age discrimination claim. The First Department ruled that the release could not be reasonably construed as being restricted to claims concerning salary, medical benefits or other forms of financial compensation, and no legal authority exists for the proposition that a release must expressly mention a discrimination claim. The failure to consult with an attorney was also held not to preclude enforcement of the release.

Skluth is distinguishable on its facts and procedural posture. First, the language of the release in that case is much broader than the language in the Stipulation. The employee agreed to "release and forever discharge" his employer of "all liability of every kind, nature and description" arising out of his employment. Here, the Stipulation does not contain such broad, all-encompassing language and merely states it applies to "all claims arising of the landlord-tenant relationship." Second, the release is Skluth was given in connection with the termination of employment, and not the settlement of a particular litigation. Here, the Stipulation was given in the context of settling a non-payment of rent proceeding and the clear purpose of the Stipulation was to outline the terms of that settlement. As the Court of Appeals has noted, sometimes even general releases "are given in circumstances where the parties are sometimes looking no

further than the precise matter in dispute that is being settled.” Mangini v McClurg, 24 NY2d at 562. Third, the plaintiff in Skluth was “an educated, experienced businessman with knowledge of release letters such as the one he was asked to execute.” 163 AD2d at 107. In this case, plaintiff was without legal counsel at the time the Stipulation was entered into, there is no evidence that she was knowledgeable about releases in general or housing discrimination and harassment claims, and she alleges that she was assured by both the housing court attorney and the presiding judge that the release was limited in scope. Finally, the complaint in Skulth was not dismissed pre-answer, but was decided on summary judgment after the completion of discovery.

For these reasons, defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (5) are denied. Plaintiff's cross motion for an order granting summary judgment to plaintiff is also denied for the reasons stated herein. Finally, plaintiff's request for an award of sanctions against defendant Lewis pursuant to 22 NYCRR 130-1.1(c) for allegedly engaging in frivolous motion practice is denied. While defendants did not prevail on their respective motions, their conduct/positions were not completely without merit in law, nor were the motions initiated primarily to delay or prolong resolution of the litigation within the meaning of this court rule. Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v. 198 Broadway, 76 N.Y.2d 411 (1990)]. Accordingly, that branch of plaintiff's motion seeking the imposition of sanctions, costs or attorneys fees is hereby denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant Lewis' motion to dismiss the complaint is denied in its

entirety; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that defendant Berezin's motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that defendants Lewis and Berezin shall serve and file an answer to the complaint within twenty (20) of service of a copy of this order with notice of entry.

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 17, 2008

SO ORDERED:



HON. JUDITH J. GISCHE, J.S.C.

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