

**Ruggiere v J.W.P. Welsbach Elec. Corp.**

2008 NY Slip Op 32638(U)

September 22, 2008

Supreme Court, Nassau County

Docket Number: 15667-97

Judge: Daniel Martin

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**SHORT FORM ORDER  
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice**

**TRIAL/IAS, PART 31  
NASSAU COUNTY**

**JESSE RUGGIERE, an infant by his father and  
natural guardian, JOSEPH M. RUGGIERE and  
JOSEPH M. RUGGIERE, and ALLSTATE  
INSURANCE COMPANY a/s/o JESSIE RUGGIERE.**

**Plaintiffs.**

**Sequence No.: 017  
Index No.: 015667/97**

**- against -**

**J.W.P. WELSBACH ELECTRIC CORP., THE  
COUNTY OF NASSAU, THE TOWN OF HEMPSTEAD  
and JOHN SANGIORGI.**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Order to Show Cause and Affidavits Annexed</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Upon reading the papers submitted and due deliberation having been had herein, defendant John Sangiorgi's motion for an order enforcing a purported stipulation of settlement in this action settling plaintiffs' claim against defendant Sangiorgi in the sum of \$25,000.00, the amount of the policy under which Sangiorgi was an insured is denied.

The instant matter is based upon an automobile accident that occurred on August 5, 1996 when then infant plaintiff Jesse Ruggieri suffered injuries when he was allegedly struck by the vehicle owned and operated by defendant Sangiorgi. Plaintiff maintained a cause of action against defendant Sangiorgi based upon the negligent operation of his vehicle and a cause of action against defendants County of Nassau and J.W.P. Welsbach Electric Corp. for their negligent installation, maintenance, repair, etc. of a traffic light at the intersection where the accident occurred. Allstate Insurance Company then commenced an action as subrogor of Jessie Ruggieri, for excess no-fault benefits paid on behalf of Jesse Ruggieri. The two actions were consolidated by short form order of the Hon. Marvin E. Segal dated September 25, 1998. From

March 1, 2002 until April 13, 2006 the action was stayed due to defendant Welsbach's insurer's bankruptcy. On October 25, 2006 a pre-trial conference was scheduled at which time the matter was dismissed by order of the Hon. R. Bruce Cozzens of the same date due to plaintiff Ruggieri's counsel's failure to appear thereat. By short form order dated July 16, 2007 this court issued a short form order which vacated the order dismissing the action and set the matter down for trial on October 1, 2007 and substituted Dell & Little as attorneys for plaintiff Ruggieri.

Defendant Sangiorgi now moves to enforce a purported stipulation of settlement between his attorneys and plaintiffs herein. In her supporting affirmation Wendy Tobias, Esq., an associate employed by Sangiorgi's attorneys, Cullen & Dykman, LLP affirms that:

1) On May 26, 2006 Joseph Miller, Esq. of Cullen & Dykman wrote plaintiffs' attorneys, Mark Constantino, Esq. for Ruggieri and Serpe, Andree & Kaufman for Allstate advising them that Sangiorgi's carrier, New York Mutual Central Fire Insurance Company was tendering its entire \$25,000.00 policy and that the plaintiffs should determine how they wished to distribute same between them;

2) by letter dated October 17, 2006 plaintiff Ruggieri's attorney Mark Constantino advised Cullen & Dykman that he accepted \$20,000.00 on behalf of Ruggieri with Allstate's share being \$5,000.00;

3) on October 28, 2006 Sangiorgi's attorney wrote to what it believed was Ruggieri's attorney, Constantino, requesting a discontinuance and release. On May 9, 2007 Dell & Little served the order to show cause which resulted in the July 16, 2007 order which vacated Justice Cozzens' order and substituted Dell & Little as attorney for Ruggieri.

Defendant Sangiorgi moves for an order enforcing the letters exchanged between the attorneys set forth above on the grounds that Constantino had apparent authority to enter into a binding stipulation of settlement on behalf of Ruggieri. There is also no proof that Constantino knew that Dell & Little had executed a consent to change counsel to represent plaintiff Ruggieri as when Dell & Little attempted to serve same on Constantino it was twice returned as undeliverable in April and June, 2006. Further, Sangiorgi was not served with the order to show cause for an order substituting Dell & Little until May, 2007 and Dell & Little was not the attorney of record until July, 2007. It is therefore defendant Sangiorgi's position that Constantino was still the attorney of record with apparent authority to settle the action on Ruggieri's behalf.

In opposition Jesse Ruggieri avers that after being advised by Mr. Constantino that his case "was going nowhere" he went to Dell & Little to determine whether his claim was viable and on April 6, 2006 he executed a consent to change attorney which substituted Dell & Little for Constantino. In October, 2006, avers Mr. Ruggieri, he received a letter from Constantino advising him of the offer to settle the action as against Sangiorgi. He contacted Mr. Constantino and advised him that he would consider the offer. He then turned the letter from Constantino over to Dell & Little. After the conversation with Mr. Constantino Mr. Ruggieri was not contacted by Constantino by letter or otherwise. Most importantly, Mr. Ruggieri avers that at no

time did he consent to the settlement of the case and Mr. Constantino did not have the authority to settle the case. Plaintiff Ruggieri contends that the motion should be denied because Sangiorgi did not have Mr. Ruggieri's authority to settle his claims.

Pursuant to CPLR 2104:

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

An attorney must be specifically authorized to settle and compromise a claim because an attorney has no implied power by virtue of his general retainer to compromise and settle a claim on behalf of his client. See, Nash v. Y and T Distributors, 207 A.D.2d 779 (2<sup>nd</sup> Dep't 1994). Where, as here, it is established that the attorney lacked express authority to settle plaintiff's claim it must be determined whether there was apparent authority upon which defendant could rely. *Id.* In determining whether the attorney had such apparent authority defendant must demonstrate that some kind of communication or conduct on the client's and not the attorney's part led defendant to believe that the attorney had authority to enter into the settlement on its client's behalf. *Id.* See, also, Melstein v. Schmid Laboratories, Inc., 116 A.D.2d 632 (2<sup>nd</sup> Dep't 1986). Further, a party who relies upon the authority of an attorney to settle an action on behalf of his client “deals with such an attorney at his own peril.” Melstein v. Schmid, *supra.* at 634 citing Slavin v. Poyak, 99 A.D.2d 466 (2<sup>nd</sup> Dep't 1984).

In the instant matter there is no proof in the record herein that any action on plaintiff Ruggieri's part could be relied upon by defendant Sangiorgi to lead him to conclude that Constantino had the authority to enter into a stipulation of settlement. As set forth above, such communication or conduct must come from Ruggieri and not from Constantino. See, Nash v. Y and T Distributors, *supra.*; Melstein v. Schmid Laboratories, Inc., *supra.*

Unavailing is defendant Sangiorgi's position that apparent authority existed because Constantino had been retained by Ruggieri to make court appearances herein. The cases cited by defendant Sangiorgi in which the court held that the attorneys for plaintiffs had apparent authority based upon their court appearances involved terms of settlement that were arrived at pre-trial conferences held pursuant to 22 NYCRR 202.26. In fact, those cases further recognized the requirement that counsel appearing on its clients' behalf at such conferences must be authorized to make binding stipulations. 22 NYCRR 202.26(e). See, Davidson v. Metropolitan Transit Authority, 44 A.D.2d 819 (2<sup>nd</sup> Dep't 2007); Arvelo v. Mult Trucking, Inc., 194 A.D.2d 758 (2<sup>nd</sup> Dep't 1993). In Edwione v. Hussain, 7 A.D.3d 751 the court found that plaintiff's attorney had apparent authority without setting forth the basis for same. Lastly, in In Re Davis, 292 A.D.2d 452 the plaintiffs/petitioners in related probate proceedings and a declaratory judgment action on the title of property were present in court when the attorney in the probate proceeding entered into a stipulation of settlement in open court for both matters and the court found unconvincing the clients' position that the attorney in the declaratory judgment matter

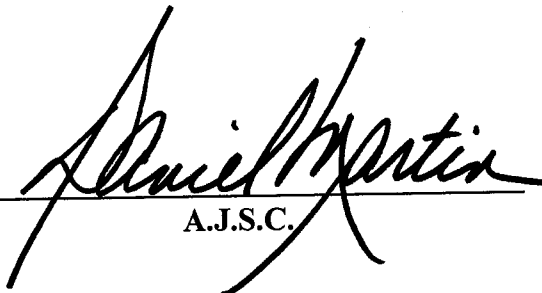
should have likewise been present.

In the instant matter the settlement was offered not in the context of a pre-trial conference or in open court, but was an offer that was communicated to Mr. Ruggieri's technically then attorney. Thus, the court finds that there was no apparent authority for Mr. Constantino to settle the case on Mr. Ruggieri's behalf.

Accordingly, the motion is denied.

So Ordered.

**Dated:** September 22, 2008

  
A.J.S.C.

**ENTERED**  
SEP 24 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE