

Lopez v Staples, Inc.
2008 NY Slip Op 33060(U)
October 27, 2008
Supreme Court, New York County
Docket Number: 115588/07
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 115588/2007
LOPEZ, MARCELINO
VS.
STAPLES, INC.,
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 115588-07
MOTION DATE 6/12/2008
MOTION SEQ. NO. #001
MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

1-2
3-5
6-11

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No to vacate settlement

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FOR THE FOLLOWING REASON(S):

10/27/08

HON. SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Dated:

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
MARCELINO LOPEZ,

Index No. 115588/07

Plaintiff,

**DECISION and
ORDER**

-against-

STAPLES, INC., STAPLES CONTRACT &
COMMERCIAL, INC., REGAN MANAGEMENT
CORPORATION and SECOR LEASING
ASSOCIATES, LLC,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.

FILED
OCT 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action for personal injuries alleging claims for common law negligence and violations Labor Law §§ 240, 241 and 200, defendants move to dismiss the complaint pursuant to a release, CPLR 3211(a)(5). Plaintiff cross-moves to vacate the settlement agreement and release. Defendants have answered the complaint, raising the settlement agreement and release as an affirmative defense.

Background

The four-page purported settlement agreement, which contains a general release of the defendants in this action and Hartford Casualty Insurance Company (Hartford), is undated and unsigned. Defendants also present a Uniform Qualified Assignment and Release (UQAR), initialed and signed by plaintiff, which refers to a settlement agreement or release, but the space for insertion of the date of that document is blank. The UQAR assigns the obligation of Hartford Casualty Insurance Company to make the settlement payments to plaintiff to another Hartford entity. Pursuant to the terms of the settlement, plaintiff received from Hartford a \$5,000.00

check in May 2006 and three checks in the amount of \$751.44 in June, July and August 2006.

After that, plaintiff refused further payments. It is apparent that the UQAR is a separate document from the unsigned settlement agreement because it contains two recitals, A and B, and eleven numbered operative provisions, whereas the purported settlement agreement contains three recitals, A through C, and fourteen operative provisions, some with subparagraphs.

It is undisputed that plaintiff was not represented by counsel until after Hartford received the purported settlement papers, which appears to have occurred some time between May 15 and June 5, 2006. Plaintiff's affidavit states that he stopped accepting the settlement checks after he retained counsel.

Plaintiff's affidavit in support of the cross-motion to vacate the settlement alleges that on April 18, 2006, plaintiff was injured in a fall while repairing the basement ceiling of a building that houses a Staples store. Plaintiff alleges that he was employed by defendant Regan Management (Regan), the managing agent of the building. Plaintiff's cross-moving affidavit avers that Alan Nemlich, Regan's principal, instructed him to repair the ceiling using red shelving that already was in the basement instead of a scaffold. In addition, plaintiff alleges that he asked Mr. Nemlich, to rent a scaffold.

After the accident, plaintiff was taken to the hospital by ambulance, where he remained until May 12, 2006. On May 6, 2006, plaintiff underwent surgery on his left leg, which involved fixation of bones with screws and a plate. While he was in the hospital, he took pain medication.

Plaintiff's affidavit states that he is the main bread winner in his family of four, which includes his wife, who works part-time, and two school-age children. Plaintiff avers that while he was in the hospital and taking prescription pain medication, he was contacted by Peter

Feighan, a representative from Hartford, who called him at least six times. Mr. Feighan sent papers to plaintiff's wife, who brought them to the hospital. Plaintiff further avers that he signed the papers in the hospital before his operation on May 6, 2006 and that his wife mailed them back to Hartford.

According to plaintiff, Mr. Feighan told him that the hospital bills needed to be paid, that he wanted to help plaintiff and his family with money, that plaintiff needed to sign papers, and that there was no other source of money. Plaintiff avers that Alan Nemlich, also told him that insurance company papers needed to be signed in order to pay the hospital bills. Plaintiff's affidavit states that he would never have signed the papers if he knew that they would cause him to lose his right to workers' compensation benefits or that he could sue in court for damages. He avers that he relied on Mr. Feighan's representation that there were no other sources of money to pay the hospital bills. Plaintiff's conversations with Messrs. Feighan and Nemlich were in English.

Plaintiff's states that he signed "the papers," but was unable to read or understand them because they were in English, which he does not read very well. Plaintiff contends that he doesn't understand English "beyond simple conversation" and that his native language is Spanish.

In their opposition to the cross-motion, Mr. Feighan asserts that plaintiff never said that he was taking medication or in pain when discussing the settlement. Mr. Feighan avers that the \$50,000.00 settlement was made in good faith because the claim was defensible. Mr. Nemlich told him that he did not direct or control plaintiff's work or employ him, and that plaintiff was working alone on a makeshift scaffold, contrary to Mr. Nemlich's instructions when the accident

happened. Mr. Nemlich's affidavit states that he hired plaintiff, an independent contractor, and told him that he should rent a scaffold and do the work with the help of two or three laborers. Mr. Nemlich alleges that he told plaintiff that he would reimburse him for renting the scaffold, gave plaintiff a key to the premises and told him not to work after hours. Mr. Nemlich disputes that he discussed medical bills with plaintiff while he was in the hospital.

Mr. Nemlich and Mr. Feighan state that plaintiff has no trouble conversing in English. Mr. Nemlich states that before the accident he hired plaintiff as an independent contractor to do odd jobs and had spoken to plaintiff approximately forty times, always in English. At no time did Mr. Nemlich observe that plaintiff had a problem understanding their conversations. Neither Mr. Feighan nor Mr. Nemlich states that plaintiff can read English.

Defendants urge that plaintiff's cross-moving affidavit did not state that he was incapacitated by the medication he took in the hospital. In his reply papers, plaintiff submitted an affirmation by Louis C. Rose, M.D., which stated that, based upon his review of plaintiff's medical records, the morphine drip and pain medications plaintiff took in the hospital would interfere with his cognitive thinking.

The issue of whether plaintiff was an employee of Regan has not been resolved. Plaintiff commenced a proceeding against Regan before the Workers' Compensation Board (Board), which was stayed pending court resolution of the validity of the settlement agreement.

Discussion

On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group*,

LLC, 19 A.D.3d 273, 275 (1st Dept. 2005). Affidavits and other evidence may be freely used by the plaintiff to preserve inartfully pleaded claims. *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316 (1st Dep't 1989). Factual allegations are not presumed to be true if they are conclusively disproved by documentary evidence. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495 (1st Dep't 2006).

A release is a jural act of high significance which should not be set aside, except where any other result would result in grave injustice, namely where there are circumstances that amount to duress, illegality, fraud, or mutual mistake. *Toledo v. West Farms Neighborhood Housing Dev. Fund*, 34 A.D.3d 228 (1st Dep't 2006). However, a motion to dismiss should be denied where fraud or duress in the procurement of the release is alleged and the allegations of fraud are sufficient to support a possible finding that the release was obtained under circumstances which indicate unfairness. *Bloss v. Va'ad Harabonim of Riverdale*, 203 A.D.2d 36 (1st Dep't 1994)(potential bankruptcy and little time for deliberation); *Farber v. Breslin*, 47 A.D.3d 873, 877 (2d Dep't 2008), citing *Gibli v. Kadosh*, 279 A.D.2d 35, 41 (1st Dep't 2000). Where it is alleged that a release was procured by fraud or duress, the burden of persuasion is on the releasee. *Mangini v. McClurg*, 24 N.Y.2d 556, 563 (1969).

Here, the motion to dismiss must be denied because plaintiff alleges that there were circumstances amounting to fraud or duress that would preclude enforcement of the release. Viewing the evidence in the light most favorable to plaintiff, the release was obtained on the false representation, upon which plaintiff relied, that it was the only money plaintiff could ever receive, when he was entitled to workers' compensation and had a viable lawsuit, at a time when plaintiff was in the hospital, in severe pain, taking medication, worried about supporting his

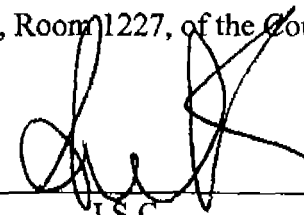
family, unable to read the papers he signed due to a language barrier, and unrepresented by counsel. Moreover, the documentary evidence is not conclusive because the settlement and release do not bear plaintiff's signature and plaintiff alleges only that he signed "papers." Plaintiff's submission in reply of the doctor's affirmation stating that plaintiff's cognitive ability was impaired by the medication will not be considered by the court. However, on a motion to dismiss, that fact could be inferred from plaintiff's original cross-moving affidavit.

On the other hand, the cross-motion to vacate the release must be denied because defendants dispute plaintiff's allegations that he was unable to understand the import of the settlement due to medication, pain or a language barrier, or that there were other means of recovery available to plaintiff, such as worker's compensation benefits or a potentially successful lawsuit. Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is denied and plaintiff's cross-motion to vacate the settlement and release is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 20, 2008, at 11:00 a.m., in Part 54, Room 1227, of the Courthouse located at 111 Centre St., New York, NY.

Dated: October 27, 2008



 J.S.C.

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 OCT 28 2008
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