

**Cordon v City of New York**

2010 NY Slip Op 31644(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 106052/09

Judge: Karen S. Smith

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

PRESENT: KAREN S. SMITH  
Justice

PART 62

ANGEL CORDON, an Infant under the age of 14 years, by his Mother and Natural Guardian SUYAPA CORDON, and SUYAPA CORDON, individually,

Plaintiffs,

- v -

CITY OF NEW YORK,

Defendant.

INDEX NO. 106052/09  
MOTION DATE 6/17/10  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion — Affidavits — Exhibits

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

Reply \_\_\_\_\_

**FILED**

JUL 01 2010

NEW YORK COUNTY CLERK'S OFFICE

PAPERS NUMBERED

1

2

Cross-Motion:  Yes  No

Upon the foregoing papers, and after oral argument on June 17, 2010, it is ordered that this motion by the City of New York is granted as provided below.

Plaintiff Angel Cordon (hereinafter "plaintiff") alleges that he was injured while rollerblading in Riverside Park on July 30, 2008. A notice of claim was filed with the Office of the Comptroller for the City of New York, pursuant to General Municipal Law § 50-a, on or about September 30, 2008. On March 23, 2009, before the instant action was commenced, plaintiff's counsel was in discussions with the Comptroller's office in an effort to settle the action and David Barbaro, the Personal Injury Division Chief in the Bureau of Law and Adjustment of the New York City Office of the Comptroller, offered plaintiff \$10,000 to settle all plaintiff's claims. Plaintiff neither accepted nor rejected the offer, but commenced an action by filing a summons and complaint on or about April 24, 2009, which was served on the City of New York Law Department (hereinafter "Corporation Counsel"). Corporation Counsel interposed an answer on behalf of defendant on or about June 2, 2009, and the parties proceeded to engage in Court-assisted discovery until February 18, 2010, when plaintiff informed the Court and the attorney appearing for Corporation Counsel at the scheduled compliance conference that the case had been settled. The Court records show that the compliance conference was marked adjourned to April 1, 2010, awaiting documentation to support plaintiff's representation that it was, in fact, settled. Prior to the April 1 conference, plaintiff filed an infant's compromise order and faxed the Court on March 31, 2010, confirming the settlement.

By order to show cause on May 3, 2010, the City of New York sought a "stay" of the infant's compromise hearing, then scheduled for May 6, 2010, and also an order estopping plaintiffs from asserting that a valid settlement agreement exists. This Court signed the order to show cause and ordered the

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

hearing canceled, noting that it would be rescheduled at the resolution of the order to show cause, if appropriate, and directed the parties to appear for argument on the order to show cause on June 17, 2010.<sup>1</sup>

In its moving papers, defendant City of New York alleges that plaintiff's counsel defended the deposition of Angel Cordon on the morning of February 4, 2010, in which plaintiff's testimony raised serious questions about the City's ultimate liability based on conflicting descriptions of where the accident took place. Immediately thereafter, counsel contacted David Barbaro at the Office of the Comptroller. The City submits Barbaro's affidavit, in which he states that he personally negotiated a pre-suit settlement offer of \$10,000 with plaintiff's counsel on March 23, 2009. This settlement offer was based on the testimony provided at the 50-h hearing and also plaintiff's Notice of Claim, which indicated plaintiff was injured at Riverside Park. When Peter Ronai, Esq., plaintiff's counsel, contacted him nearly a year later, on February 4, 2010, Ronai told Barbaro that the claim must have "fallen through the cracks" and that a written confirmation of the offer was necessary for the infant's compromise order. Only after sending the letter, which did confirm that a \$10,000 offer was open to plaintiff for full settlement of the claims, did Barbaro learn that subsequent to the original settlement offer, an action had been commenced and the parties had already engaged in discovery, including the EBT of the City's witness and the EBT of plaintiff, at which Corporation Counsel alleges it became clear to it that plaintiff was likely injured at a skate park not owned or operated by the City of New York, contrary to the 50-h testimony and the Notice of Claim.<sup>2</sup> Barbaro states that in his conversation with Ronai, he was led to believe that circumstances had not changed but that the claim had simply "fallen through the cracks", and that had he known these facts he would not have sent the confirmation of the 2009 offer. Barbaro also states in his affidavit that typically the Comptroller's office is advised by counsel prior to making an offer of settlement where an action has been commenced, such as was the case here.

In opposition to the instant motion, plaintiff submits the affidavit of Peter Ronai, a partner at the law firm of Ronai & Ronai, LLP. Ronai confirms that between October 2008 and March 2009, he spoke with several individuals in the Comptroller's office, resulting in a verbal offer of \$10,000 by Barbaro on March 26, 2009, which was neither accepted nor declined. He also confirms that after the February 4, 2010 depositions and after "discussing the strengths and weaknesses of the case" with his partner, Ronai contacted Barbaro and asked if the offer was still open, and then asked him to put it in writing so it could be included in the infant's compromise papers. Ronai does not dispute Barbaro's statement that he was told that the claim simply "fell through the cracks," but he emphasizes that the letter Barbaro sent confirming the offer contained no conditions.

Stipulations of settlement must conform with the provision of CPLR § 2104, which requires that such agreements be in writing and signed by the party or parties to be bound, or their counsel, or that the settlement be made in "open court" (*DeVita, et al. v Macy's East, Inc., et al.*, 2007 NY Slip Op 483 [2d Dept January 23, 2007]). Such stipulations are not to be lightly cast aside by the court, particularly those settlements which have been made in "open court," and a party will be relieved from the consequences of a stipulation made during litigation only where there is sufficient cause to invalidate a contract, such as

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<sup>1</sup> Although the City did seek a "stay" of the infant's compromise hearing, and plaintiff objects to the Court's issuing a "stay" without being afforded an opportunity to object per "the new rules," no such "stay" was granted. The calendaring of infant's compromise hearings is left to the management of the judge to whom it is presented. In this case, the Court's infant's compromise hearing calendar does not afford time to address the in-depth issues raised by the City's motion, nor does the Court have any interest in keeping a disputed infant's compromise on the calendar when it could not be approved prior to this motion's resolution. As such, the Court, in its discretion, canceled the hearing.

<sup>2</sup> The City submits the affidavit of Crista Carmody, a Park Manager of Riverside Park, who states that the skate park within Riverside Park was closed on the date plaintiff alleges the accident occurred, and also that the Parks Department does not rent or provide skates or other equipment, contrary to plaintiff's testimony that the park had provided his equipment.

fraud, collusion, mistake or accident, or other such ground (*Hallock et al. v State of New York et al.*, 64 NY2d 224, 230 [1984]).

Initially, the City contends that the letter offer signed by Barbaro and the letter acceptance signed by Holly Ostrov Ronai, counsel for plaintiff, do not satisfy the requirements of CPLR § 2104, an argument rejected by plaintiff. In addition, plaintiff takes the position that settlement was made in "open court." The parties appeared for a compliance conference on February 18, 2010, at which plaintiff's counsel and an Assistant Corporation Counsel in the Tort Division of the Law Department, Ponni Wazdian, met with Court Attorney David Solomkin,<sup>3</sup> who was assisting this Court with discovery conferences. At that time, plaintiff's counsel informed both Mr. Solomkin and Ms. Wazdian that plaintiff had accepted an offer to settle and that there was no need for a discovery conference. The Court's notes, made by Mr. Solomkin, indicate same and that the Court was marking the conference as adjourned to April 1, 2010 awaiting confirmatory paperwork, presumably because Ms. Wazdian had no knowledge of the settlement or there was some other uncertainty remaining.<sup>4</sup>

The Court sees no basis for the City's argument that the settlement does not satisfy CPLR § 2104. The unconditional offer to settle all claims by plaintiffs was signed by Barbaro on behalf of the City of New York Office of the Comptroller, which is authorized to settle claims against the City (see New York City Charter § 93[~~jj~~]), and whom plaintiff concedes is "the defendant." Counsel for plaintiffs unconditionally accepted the offer in writing and signed, as required by CPLR § 2104. The terms were clear and unambiguous, contrary to the City's argument, in that plaintiffs agreed to settle all claims for \$10,000. The settlement was not, however, made in "open court," as alleged by plaintiff. As the Court of Appeals has explained,

The term 'open court' as it has been used since ancient times and as, it will be suggested, it is used in CPLR § 2104, is a technical term in the law. It refers to a judicial proceeding in a court, whether held in public or private, and whether held in the court house, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business. Typically, in a court of record an open court has in attendance a clerk who makes entries of judicial events in a docket, register, or minute book, and in modern times there is a court reporter, who makes a record of all the proceedings. An open court is not a 'judge in chambers,' in the technical sense of that phrase, and it is neither a judge nor a clerk acting in his proper person anywhere, whether in the courtroom or elsewhere. (*In the Matter of Dolgin Eldert Corporation, et al. v Jordan H. Dolgin et al.*, 31 NY2d 1, 4-5 [1972] [internal citations omitted]).

If plaintiff takes the position that a settlement was reached on paper, through the written offer and later the written acceptance, it is contradictory to allege that it was reached in "open court." Further, and more importantly, appearance with a Court Attorney to address issues of discovery, where there is no clerk charged with making entries in a docket, and no reporter to make a record, and where plaintiff admittedly merely informed the attorney appearing on behalf of the City of New York (who, incidentally, had no authority to settle the case) that a settlement had been reached outside of court, does not constitute settlement in "open court."

Having determined that a settlement agreement was, in fact, reached via the parties' respective letters, the Court must now determine whether there are grounds for vacating that agreement or estopping plaintiffs from relying on it. In this case, contrary to plaintiffs' assertions at oral argument, unilateral

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<sup>3</sup> Plaintiff refers to Mr. Solomkin as "Special Master Referee," however Mr. Solomkin is not acting as a "Special Master Referee" at discovery conferences. Although Mr. Solomkin does and may act as a Special Master or Special Referee in certain circumstances, such an assignment requires an order for a special reference, which was never issued for this matter.

<sup>4</sup> Typically, where all parties are in agreement that a settlement has been reached, the Court Clerk marks the case as settled, rather than scheduling a future appearance or a control date as was done here.

mistake may be a sufficient basis for relieving the City of New York from the consequences of the settlement agreement.

A stipulation may be voided for unilateral mistake only where "(1) enforcement would be unconscionable; (2) the mistake is material and made despite the exercise of ordinary care by the party in error; (3) the innocent party had no knowledge of the error; and (4) it is possible to place the parties in status quo ante" (*Greene v M.S. Housing Associates and DHPD*, 24 Misc3d 1202A, 2009 NY Slip Op 51233U [Civ Ct, NY Cty 2009]; see also *In the Matter of the Accounting by Judy Tray as Co-Administrator c.t.a. of the Estate of Pearl Siegel*, 5 Misc3d 1017A, 2004 NY Slip Op 51414U [Surrogate's Court, Nassau Cty November 18, 2004], *aff'd by Matter of Siegel*, 2006 NY App Div LEXIS 6911 [2d Dept 2006]).

Here, there is evidence that enforcing the stipulation would be unconscionable. The stipulation was the result of plaintiffs' counsel communicating directly with a party, the Office of the Comptroller, and failing to disclose that the City was represented by counsel in an action that was commenced after the original settlement offer was made. Further, although the City witness who gave testimony at an EBT on the morning of February 4, 2010 was represented by Corporation Counsel's office, Ronai admits that after the EBTs that morning, he contacted Barbaro, who was not present at that deposition and could clearly not have been apprized of the events of the deposition within hours of its conclusion, rather than Corporation Counsel. In addition, plaintiffs' counsel does not dispute Barbaro's sworn statement that when he called to inquire as to the status of the nearly one year old offer, Ronai represented that the offer had not been accepted because the claim "fell through the cracks." While Ronai is clearly not obligated to counsel the defendant as to the material facts of the case or whether settlement is advisable, this was a misrepresentation seemingly intended to create the sense that circumstances had not changed since Barbaro made the initial offer, nearly a year earlier.

The mistake here was clearly material and there is no evidence that Barbaro could have discovered that an action had been commenced through the exercise of ordinary care. The summons and complaint and all subsequent communications and transactions in the litigation were admittedly directed toward Corporation Counsel's office, and plaintiff has provided no evidence to support the assumption that the Comptroller's Office must surely have known about the litigation despite an utter lack of communication between plaintiff and Barbaro since the commencement of the action. Barbaro affirms that, had he known that an action had been commenced and an answer interposed by counsel, he would never have confirmed that an offer was still open, since it was based, in part, on the fact that litigation could be avoided if the offer was accepted.

Most importantly, the parties can easily be placed in the position as they were in prior to entering into the settlement agreement. There is no evidence of reliance on the settlement, and plaintiff was placed on notice of the underlying objections within a reasonable period, first by a letter to plaintiff's counsel dated March 15, 2010 in which Barbaro purported to withdraw the offer, and subsequently by service of this order to show cause on or about May 5, 2010, less than three months from counsel's February 18, 2010 acceptance of the offer.

Although plaintiff's counsel, at oral argument, asserted that relieving the defendant from the consequences of this stipulation would result in severe prejudice to plaintiff because it would leave him without the ability to recover from other potential parties, the Court can see no prejudice that would be caused by returning the parties to the position they were in prior to February 18, 2010. Although plaintiff will now be required to prove liability of the City through litigation of this action, had the settlement agreement never come to fruition, plaintiff would have had the same burden. If, as plaintiff seems to be indicating is true, the City does not have ultimate liability in this case, that is an issue separate and apart from the settlement vacatur. Plaintiff was always in the best position to know when, where and how this accident happened, and to ascertain the appropriate party or parties to this suit. Should it turn out that the City's assertion is correct, and plaintiff's accident happened in a park not identified in the Notice of Claim and not owned or maintained by the City of New York, any resultant prejudice is caused by a failure to identify same in the first instance. Moreover, this apparent admission by plaintiff's counsel that the City will not be liable in this action only reinforces the duplicity and lack of forthrightness in counsel's efforts to obtain the settlement.

Finally, the Court is compelled to address the issue of whether the conduct by plaintiff's counsel was within ethical bounds, as counsel adamantly insisted that there was no lapse in ethics here. Pursuant to the longstanding Rules of Professional Conduct,

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law. (22 NYCRR § 1200.33)

It appears to this Court, from the plain language of the Rule, that Ronal, as counsel for plaintiff, was prohibited from contacting the New York City Office of the Comptroller without the knowledge and consent of Corporation Counsel after the complaint was filed and served. There is no dispute that Corporation Counsel had appeared on behalf of the City since the inception of litigation, that Ronal knew of that office's representation of the City, and even in the opposition papers counsel refers to the Comptroller as "the defendant." Counsel for plaintiff seeks to treat Barbaro as a party - "the defendant" - for purposes of binding the City of New York to a stipulation of settlement, but inexplicably argued at oral argument that Barbaro is not a "party" as this Rule of Professional Conduct applies the term. Counsel asserted that it is common practice for parties to contact the Comptroller's Office directly even after an action has been commenced. As the Court stated on the record, this may in fact be the case, but without some other provision of the law excusing counsel from the above ethical canon, it appears contrary to the Rules. This Court is not charged with determining ethical violations, but the questionable conduct in procuring the subject settlement must be taken into consideration in exercising its equitable powers.

Accordingly, it is

ORDERED that this motion by defendant City of New York is granted and the settlement, as evidenced by the offer letter by David Barbaro, Division Chief, Personal Injury, Bureau of Law and Adjustment in the New York City Office of the Comptroller, dated February 4, 2010, and the letter of acceptance by Holly Ostrov Ronal, Esq. on behalf of plaintiffs, dated February 18, 2010, is hereby vacated; it is further

ORDERED that this action be restored to the active discovery calendar in Part 62 immediately; it is further

ORDERED that the parties appear for a compliance conference on August 19, 2010 at 2:00 p.m. at 80 Centre Street, Room 103, prepared to address all outstanding discovery issues; it is further

ORDERED that movant City of New York serve a copy of this decision and order, with notice of entry, upon plaintiffs and upon the Clerk of the Court (60 Centre Street), the Clerk of the Trial Support Office (60 Centre Street), and the Clerk of the DCM Office (80 Centre Street) within 10 days of entry hereof.

**FILED**  
JUL 01 2010  
NEW YORK  
COUNTY CLERK'S OFFICES

Dated: June 28, 2010

Hon. Karen S. Smith, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST