

**Potocnik v Tracy Tenants Corp.**

2010 NY Slip Op 31840(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 106660/2007

Judge: Louis B. York

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: LOUIS B. YORK  
J.S.C.  
*Justice*

PART 2

Potoczuk

INDEX NO.

106660-2007  
1006660/07

MOTION DATE

MOTION SEQ. NO.

008

MOTION CAL. NO.

- v -  
Tracy Remants

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

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

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

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

PAPERS NUMBERED  
**FILED**  
JUL 14 2010

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

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

Dated: 7/9/10

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: 1AS PART 2

-----X  
GERDA POTOCHNIK,

Plaintiff,

-against-

TRACY TENANTS CORP. and COOPER SQUARE REALTY, INC.,

Defendants,  
-----X

106660-2007  
Index No. ~~1006660/07~~

**FILED**  
JUL 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Louis B. York, J.:

In a personal injury action, defendants Tracy Tenants Corp. and Cooper Square Realty, Inc., ("Defendants") initially moved to dismiss pursuant to CPLR 3211(a)(5). That motion was granted on default. Gerda Potocnik ("Plaintiff") then moved to vacate that dismissal and have the motion restored to the motion calendar. That motion was granted and the order is in a separate greysheet. Having restored the motion to dismiss, the court now decides that motion. For the reasons stated below, the Court denies Defendants' motion to dismiss.

Statement of Facts

On May 20, 2004, Plaintiff allegedly tripped and fell over rolled up rain mats while walking in the lobby of the apartment building she then occupied. She suffered injuries requiring surgical insertion of plates and screws in her arm. Prior to this incident, Plaintiff and Tracy Tenants (the cooperative corporation) were involved in litigation concerning a foreclosure by Citibank on plaintiff's delinquent mortgage loan. Miriam Weisbecker purchased Plaintiff's cooperative shares at a subsequent auction; Tracy Tenants used the proceeds as payment for the overdue maintenance fees that Plaintiff owed. Miriam Weisbecker commenced a holdover

proceeding to evict Plaintiff in 2005; Plaintiff responded by suing Citibank, Tracy Tenants, and Miriam Weisbecker in order to challenge the foreclosure and avoid eviction. Plaintiff moved to stay the holdover proceeding and to consolidate the actions, submitting a supporting affidavit that was approximately four pages in length. One sentence of that affidavit mentioned the arm injury that she had sustained from the May 2004 trip and fall incident.

The parties settled these actions and articulated the settlement terms in a stipulation of settlement dated January 26, 2007. That stipulation provides, in pertinent part:

It is hereby agreed by and between the parties that the above captioned matters (Gerda Potocnik, Plaintiff, against CITIBANK, N.A.; TRACY TENANTS CORP.; and MIRIAM WEISBECKER, Defendants) as follows:

1. Potocnik agrees to a final judgment of possession in favor of Weisbecker...
5. Weisbecker agrees to pay Potocnik... \$40,000...on behalf of Weisbecker's title insurance company...
6. Upon receipt of said funds, Potocnik's counsel shall pay ... use and occupancy at a monthly rate of 655.40 to Weisbecker from February 2007 ...through August 2007. Weisbecker shall pay all outstanding maintenance payments to Tracy Tenants Corp...Potocnik agrees to vacate...the premises on or before July 30, 2007.
10. Upon the receipt of the...\$40,000, Potocnik will execute and deliver general releases in favor of all defendants in the Supreme Court matter.

The general release in question provides, in pertinent part, as follows:

Gerda Potocnik, as releasor, in consideration of ten dollars and other good and valuable consideration, and in further consideration of a settlement entered into in the matter "Gerda Potocnik, plaintiff, vs. Citibank, N.A., et al," New York County Index No. 106409/2005 as consolidated with the matter of "Miriam Weisbecker, Petitioner, vs. Gerda M. Potocnik, Respondent", Civil Court, New York County, L&T Index No. 65297/05, said consideration being provided by CITIBANK, N.A., TRACY TENANTS CORP., and (*redacted*) AS RELEASEES ("RELEASEES"), hereby releases and discharges releasees and their agents...including Cooper Square Reality, Inc....together with their ...successors in interest, from all actions, causes of action, claims...controversies whatsoever, which against release, the releasor ever had, now have, or can, shall or may have, from the beginning of the world to the day of this release.

Neither the release nor the stipulation of settlement mentions Plaintiff's May 2004 arm injury.

Plaintiff commenced this personal injury action several months later on May 16, 2007 against Cooper Square Realty, Inc., the managing agent of the property, and Tracy Tenants Corp ("Defendants"). Defendants now move to dismiss, contending that the general release included this action for negligence and bars the present action. In opposition, Plaintiff argues that the motion must be denied because of the existence of issues of material fact concerning the intended scope and enforceability of the release; limiting language within the release, the existence of mutual mistake, misrepresentation, and fraud. Plaintiff also requests that the motion be denied in order to afford her the opportunity to conduct proper discovery into the events surrounding the execution of the release. For the reasons below, the court denies the motion.

#### Analysis

Defendants first argue that the general release must be enforceable due to the absence of fraud, duress, illegality, or mistake. *Mangini v McClurg*, 24 NY2d 556, 301 NYS2d 508 (1969), *Mergler v Crystal Props. Assocs.*, 179 AD2d 177, 583 NYS2d 229 (1st Dept. 1992); *Stone National Bank and Trust Company*, 188 AD2d 865, 591 NYS2d 609 (3rd Dept. 1992). Although Plaintiff does not dispute the validity of this principle, she has properly directed this Court's attention to an additionally applicable, and, in this Court's opinion, a more compelling principle of law:

"[W]here a release contains a recital of a particular claim, obligation, or controversy, and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified were intended to be discharged, the general words of release are deemed to be limited thereby." *Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382, 832 NYS2d 195, 196 (1st Dept. 2007) (citing *Mitchell v Mitchell*, 170 AD 452, 456, 156 NYS 76, 79 (1st Dept. 1915)).

As Plaintiff notes, the first clause in the release recites the particular claims to which the release is restricted and is absent of any language indicating an intent to discharge additional matters. The language “Gerda Potocnik ... in further consideration of a settlement entered into in the matter ‘Gerda Potocnik, plaintiff, vs. Citibank, N.A., et al,’ as consolidated with the matter of “Miriam Weisbecker, Petitioner, vs. Gerda M. Potocnik, Respondent’,” names the landlord tenant actions which the settlement agreement and release cover. The release then seeks to discharge all claims and causes of action from the “beginning of the earth” to the date of the release. This reference to the settled housing actions constitutes a recital of the claims and therefore, despite the words of general release, Plaintiff’s current and unrelated claim is not barred.

Defendants next argue that Plaintiff’s mere awareness of her potential claim when she signed the release precludes her from bringing the current claim. *See Schwartz v Halstead Property Company*, 4 Misc 3d 136(a), 791 NYS2d 873, 873 (1st Dept. 2004). Defendants also assert that because Plaintiff could have adjudicated her personal injury claim as a result of pre-existing controversies existing at the time of the release, that personal injury claim must be barred now, regardless of whether it actually ripened into litigation. *See Used Boat Haven Inc. v Citibank, N.A.*, 248 AD2d 610, 610, 669 NYS2d 942, 943 (2d Dept. 1998).

These arguments are unavailing. First, as Plaintiff points out, *Schwartz v Halstead Property Company*, on which Defendants rely, is distinguishable from the case at hand. In *Schwartz*, the plaintiff’s attorney added a hand-written supplement to the general release stating that that the release covered all civil and criminal claims. There is no such expressed intent in the release at issue. Furthermore, the claim that Defendants sought to bar in *Schwartz v Halstead Property Company* was related to the case that the release expressly covered. In contrast, the

personal injury claim here has no connection to the housing actions recited in the general release. The Court of Appeals stated in *Cahill v Regan*, 5 NY2d 292, 299, 184 NYS2d 348, 354 (1959) that a release's meaning and coverage "necessarily depend ... upon the controversy being settled and upon the purpose for which the release was given." This Court is therefore required to consider the housing controversy context in which the release was executed. Second, *Used Boat Haven* is of limited precedential value because the decision contains no discussion of the factual circumstances of that case and thus it is unclear that *Used Boat* can bind the court under this particular set of circumstances. Moreover, a review of the legal authority on which *Used Boat Haven* is based reveals a clear distinction from the present case. The defendant in *Lucio v Curran*, 2 NY2d 157, 157 NYS2d 948 (1956) rejected the plaintiff's offer of a limited release and made it clear that the only acceptable release would be a general one. The record does not contain evidence of any similar demands from Defendants. Therefore, *Used Boat Haven* does not control here.

Defendants also argue that this Court must enforce the release as broadly as possible because when they signed it, Defendants desired to conclude all litigation and potential litigation with Plaintiff. Defendants point to the "plain language" of the general terms as evidence of their intent. However, as was previously discussed, the limiting language within the release narrows the scope of the general language. Also, there is no written evidence of Defendants' alleged intent outside of the release.

#### Extrinsic Evidence

Plaintiff contends that extrinsic evidence further supports restricted enforcement of the release. However, this Court need not reach this point, as extrinsic evidence of the parties' intent

may be considered only if an agreement is ambiguous and this Court has already concluded that the agreement is not ambiguous. *Greenfield v Philles Records*, 98 NY2d 562, 569, 750 NYS2d 565, 569 (2002) (citing *W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440, 443 (1990)).


The court has considered the parties' other arguments, but need not reach them in deciding the motion. *See Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382, 832 NYS2d 195, 196 (1st Dept. 2007)

It is therefore

ORDERED that Defendants' motion to dismiss is denied.

Dated: 7/9/ 2010

Enter:

  
\_\_\_\_\_  
LOUIS B. YORK, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**

JUL 14 2010

NEW YORK  
COUNTY CLERK'S OFFICE