

Panella v CBS Broadcasting Inc.

2011 NY Slip Op 32349(U)

September 1, 2011

Sup Ct, NY County

Docket Number: 0101977/06

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ **J.S.C.** _____

PART 2

Index Number : 101977/2006

PANELLA, KATHERINE A.

vs.

CBS BROADCASTING INC.

SEQUENCE NUMBER : 006

VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

FILED

SEP 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/1/11

Key
LOUIS B. YORK
J.S.C. 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: IAS PART 2

-----X
KATHERINE A. PANELLA, Individually and
KATHERINE A. PANELLA, as Administratrix
of the Estate of ANTHONY PANELLA,
deceased, SUSAN A. TROY, and PATRICK
TROY,

Plaintiffs,

Index No. 101977/06

-against-

CBS BROADCASTING INC., THE ENTEGRITY
ENTERTAINMENT GROUP, LLC, MICROTECH
CONTRACTING CORP., A.P.A. RESTORATION
CORP. and ROCKLEDGE SCAFFOLD CORP.,

FILED

Defendants.

SEP 01 2011

-----X

NEW YORK
COUNTY CLERK'S OFFICE

York, J.:

~~In motion sequence 006,~~ defendant Microtech Contracting
Corp. (Microtech) moves to vacate the judgment entered against it
on December 16, 2010.

Background

On March 14, 2005, plaintiffs Katherine A. Panella (Panella)
and Susan A. Troy (Troy) were struck by a piece of falling wood
as they were walking on West 53rd Street, New York, New York. On
February 3, 2006, plaintiffs commenced this action seeking
damages for their alleged injuries as a result of this accident.
After commencement of this action, the parties started to engage
in settlement negotiations. During these negotiations, the issue
was raised as to whether Panella and Troy received Medicare
benefits for their treatments, as any settlement would be subject

to repayment of Medicare liens.

On May 6, 2010, the parties participated in a court-ordered mediation, where defendants made a settlement offer of \$1.1 million. On May 14, 2010, plaintiffs' counsel, Jonathan Rice, sent an e-mail to opposing counsel stating that there was no settlement in the case and that he was "proceeding to verify the Medicare issues so that we can do what we have to do."

Microtech's Notice of Motion to Vacate Judgment, Exhibit D. On May 18, 2010, Mr. Rice sent another e-mail stating that he expected to hear from Medicare the following week as to any amounts owed to them.

On June 8, 2010, David Persky, counsel for Microtech, e-mailed Mr. Rice informing him that Microtech retained Crowe Paradis Services Corporation (Crowe Paradis), a firm specializing in Medicare issues, to evaluate Troy and Panella's Medicare liability with respect to the proposed settlement. Mr. Persky requested that Mr. Rice have Panella and Troy execute authorizations to send to the Centers for Medicare and Medicaid Services (CMS), in order for Crowe Paradis to obtain Panella and Troy's records of Medicare benefits.

On June 15, 2010, Ginger Clements, a claims adjuster for Microtech's insurance company, sent an e-mail to Mr. Rice in regard to concluding the case and the Medicare issues. Ms. Clements suggested that Mr. Rice send the authorizations, allowing Crowe Paradis to contact CMS for a Conditional Payment Letter and Final Determination Letter. On August 3, 2010, Ms.

Clements e-mailed Mr. Rice again inquiring whether he was handling the communications with CMS. Mr. Rice responded that he was, but he also thought authorization was given for Crowe Paradis to contact CMS too. Mr. Rice stated that he did not want to hold the settlement up and offered to put money into escrow.

After a mediation conference held on August 6, 2010, the parties agreed to settle and the action was marked accordingly in the New York County Supreme Court's Mediation Part. On September 13, 2010, plaintiffs provided general releases individually signed by each plaintiff and a hold harmless agreement signed by Panella. The defendants objected to these settlement documents. Specifically, Mr. Persky again voiced concerns about the potential Medicare reimbursements, as it was still unclear whether any settlement would be subject to repayment of any Medicare liens. He felt the hold harmless agreement was inadequate to protect Microtech from any consequences of plaintiffs' failure to reimburse Medicare, so he drafted suggested language for a new hold harmless agreement. Mr. Persky informed Mr. Rice that it was critical to address the Medicare issue before any settlement.

On October 8, 2010, Mr. Rice provided additional settlement documents, including general releases signed jointly by all plaintiffs and a new hold harmless agreement with language regarding the Medicare issues suggested by Mr. Persky. Mr. Rice alleges that he corresponded with Mr. Persky and representatives from Microtech's insurance company during November 2010, advising

them that they were in default and had failed to make payment, but there is no evidence of this correspondence.

On December 1, 2010, Mr. Rice sent Mr. Persky a letter stating that plaintiffs had not yet received their settlement from Microtech, and were going to seek recourse in court unless Microtech paid its portion of the settlement within five days. On that same day, Mr. Persky and Mr. Rice also exchanged e-mails in regard to the Medicare payments. Mr. Rice informed Mr. Persky that Panella did not have any Medicare liens, and would provide such documentation, and Troy had minimal Medicare liens for her treatments. Mr. Rice offered to place money in escrow for any potential Medicare liens.

On December 2, 2010, Mr. Persky accepted the offer to place a portion of the settlement proceeds in escrow pending the receipt of the Conditional Payment Letter from CMS. Mr. Persky again asked for the documentation from CMS regarding Panella, which Mr. Rice forwarded that evening. Mr. Persky still did not receive any documentation from CMS in regard to Troy.

On December 16, 2010, plaintiffs entered judgment for Microtech's share of the settlement, which totaled \$800,000, as well as interest in the amounts of \$9,073.97 and \$4,436.99, and costs and disbursements totaling \$885.00. After judgment was entered, Microtech sent checks for the settlement amounts of \$583,332.34 and \$216,665.66 on December 17, 2010 and December 21, 2010, respectively. On January 10, 2011, Mr. Rice provided a letter from CMS advising that Medicare paid \$325.99 in benefits

to Troy. Microtech now moves to vacate the portion of the judgment awarding interest and costs and disbursements to the plaintiffs.

Analysis

CPLR 5003-a (a) states, in relevant part, [w]hen an action to recover damages has been settled, any settling defendant ... shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff.

If the settling defendant fails to pay all sums within twenty-one days of tender of a duly executed release and stipulation of discontinuance, the unpaid plaintiff may enter judgment, without further notice, against the settling defendant that has not paid. CPLR 5003-a (e). Here, plaintiffs argue that Microtech had twenty-one days from October 8, 2010, the day plaintiffs tendered the new general release and hold harmless agreement, to pay its portion of the settlement. However, CPLR 5003-a (a) does not become operative until a duly executed release is tendered by the settling plaintiff to the settling defendant, and an unpaid lien renders a general release not "duly executed."

When plaintiffs submitted the general release to Microtech on October 8, 2010, it was defective and not in good order, because it did not provide for the release of any Medicare liens. Where there is a lien with a right of subrogation to collect the amount of the lien from the settling defendant, the general

release must provide for the release of that lien. *Liss v Brigham Park Coop. Apts. Sec. No. 3*, 264 AD2d 717, 718 (2^d Dept 1999). Here, "[s]ince the Federal Government has a right of subrogation and may collect the amount of the lien directly from the defendant (see, 42 CFR 411.24), it was incumbent upon the plaintiff[s] to provide for the release of lien in the general release and stipulation of settlement." *Id.*

Microtech should not be penalized for failing to disburse settlement funds within twenty-one days of the October 2010 release, when it had spent months trying to get information from the plaintiffs as to any Medicare liens that they may have against them. Microtech was taking the steps necessary to protect itself from liability for any potential failure by the plaintiffs to pay outstanding Medicare liens. There is no showing of bad faith here. As evidenced through the correspondence between Mr. Persky, Mr. Rice, and Ms. Clements, Microtech was clear that it would not complete the settlement without adequate assurance that any Medicare lien would be satisfied, and it was not until December 2, 2010 and January 10, 2011 that Microtech received the CMS letters from Mr. Rice for Panella and Troy, respectively. There may have been an agreement to settle in August 2010, but after months of negotiations about the Medicare issue, lasting into December 2010, this action was not settled within the purview of CPLR 5003-a (a) until the Medicare issues were resolved by the CMS letters. Therefore, plaintiffs moved for judgment, pursuant to CPLR 5003-a (e),

prematurely.

Accordingly, it is

ORDERED that defendant Microtech Contracting Corp.'s motion to vacate the judgment is granted, and the judgment entered against it on December 16, 2010 is hereby vacated. Defendant Microtech Contracting Corp. is directed to serve a copy of this order with notice of entry upon the Judgment Clerk.
Dated: Septmeber 1, 2011

ENTER:

FILED

SEP 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

[Signature]

J.S.C

LOUIS B. YORK
J.S.C.