

**Ricks v 2136 Mapes, LLC**

2011 NY Slip Op 34136(U)

April 27, 2011

Sup Ct, Bronx County

Docket Number: 301185/09

Judge: Stanley B. Green

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6

-----X  
TASHAWA RICKS,

INDEX No. 301185/09

Plaintiff(s),

- against-

2136 MAPES, LLC. and 2136 MAPES PROPERTY  
MANAGEMENT, LLC.,

Defendant(s).

DECISION

-----X  
**HON. STANLEY GREEN:**

The motion by defendants for an order pursuant to CPLR §2221 granting leave to renew and reargue the motion which resulted in the decision and order of Justice Walker, dated October 7, 2010, is granted and upon renewal and reargument, the motion is granted only to the extent that defendants may file and serve an amended answer in the form annexed to the motion papers within 30 days from the date of this order.

Initially, it is noted that this motion was referred to this court because Justice Walker is now assigned to Criminal Court.

Plaintiff commenced this action to recover damages for personal injuries she sustained on June 7, 2008 when she tripped and fell on the stairs inside the premises located at 31-33 Mount Hope Place, Bronx, NY. The building was owned by 2136 Mapes, LLC at the time of plaintiff's accident. However, in December 2008 the building was sold to 31 Mount Hope, LLC.

In the underlying motion, defendants sought permission to amend their answer to include the affirmative defenses of waiver, release and accord and satisfaction.

In support of the motion, defendants submitted a copy of a document entitled "Surrender and Release" that was signed by plaintiff on August 4, 2009, a copy of a check in the amount of \$500.00 that was endorsed and cashed by plaintiff and the affidavit and deposition testimony of Jerry Glick, a principle of 2136 Mapes, LLC.

This evidence shows that prior to August 4, 2009, Jerry Glick drafted the document entitled "Surrender and Release" and that this release was intended to settle all claims that plaintiff had regarding the premises located at 31-33 Mount Hope Place, including this lawsuit, in exchange for \$500.00.

Defendants explain that the failure to annex a copy of the proposed amended answer with the original motion was an inadvertent clerical error. They contend that pursuant to CPLR §3025, permission to amend the answer to include the affirmative defenses of waiver, release, and accord and satisfaction should be granted and that there is no prejudice or surprise to plaintiff as the release was executed after commencement of this action and a Notice to Admit was served on plaintiff in February 2010, which requested her admission that the signature on the release is hers and that she received the \$500.00 check and deposited it and she did not deny its contents.

Plaintiff contends that defendants' motion to renew and reargue should be denied because they have failed to present new evidence or demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.

Plaintiff also contends that if the motion is considered, it must be denied because the document she signed on August 4, 2009 consisted of only one page and that she was told by defendants' agent, Freddie Shkrelli, who was aware of her injuries, that the release was for the check she was owed in the Landlord/Tenant action.

In opposition to the motion, plaintiff submits her own affidavit and a copy of a stipulation she entered into with 31 Mount Hope, LLC on May 12, 2009 in the Landlord/Tenant action. This evidence shows that in April 2009, Mount Hope, LLC. filed a complaint against plaintiff in Civil Court and that the action was settled pursuant to a so-ordered stipulation between plaintiff and 31 Mount Hope in which she agreed to voluntarily vacate the apartment by August 31, 2009 in exchange for the sum of \$500.00. According to plaintiff, she moved out of the apartment on August 1, 2009 and when she dropped off her keys to Shkreli on August 4, 2009, he told her to sign a one page document in exchange for the \$500.00 check. However, the document consisted of only one page and she did not discuss her personal injury action and did not intend the document to pertain to her personal injury claim.

Clearly, the failure to annex a copy of the proposed amended answer to the original motion papers was inadvertent. Therefore, in the absence of any showing by plaintiff of prejudice attributable to the delay caused by the failure, renewal is properly granted (BBY Diamonds Corp. v. Five Star Designs, Inc., 6 AD3d 263).

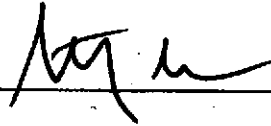
Pursuant to CPLR §3025(b), permission to amend the pleadings should be freely given in the absence of prejudice and mere lateness is not a barrier to the amendment (CPLR § 3025(b)). In deciding a motion for leave to amend, the court applies a two-pronged test. First, the proponent must allege legally sufficient facts to establish a prima facie cause of action in the proposed amended pleading and second, the court must test the pleading's merit.

While the evidence presented by defendants is sufficient to demonstrate, prima facie, that the proposed affirmative defense has merit, plaintiff's affidavit and evidence raises material issues of fact as to whether she was given a complete copy of the document and whether she

intended to settled this lawsuit in exchange for \$500.00. Accordingly, the motion to amend the answer is granted and upon amendment, the motion to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: April 27, 2011

A handwritten signature in black ink, appearing to read 'Stanley Green', is written over a horizontal line.

STANLEY GREEN, J.S.C.