

Sweeny v Richter

2013 NY Slip Op 30679(U)

April 4, 2013

Sup Ct, New York County

Docket Number: 0104467/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART _____

Index Number : 104467/2011
SWEENEY, HELEN H.
vs.
RICHTER, ROY
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*
decided in accordance with the annexed
memorandum decision.

FILED

APR 08 2013

NEW YORK
COUNTY CLERK'S OFFICE

HON. JOAN A. MADDEN
J.S.C.

Dated: *April 4, 2013*

[Signature]

J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----x
HELEN H. SWEENEY,

Plaintiff,

104467/11
Index No. ~~114067/11~~

- against -

ROY RICHTER, CHRIS MONAHAN, THOMAS
SULLIVAN, LOUIS TURCO, as Board of Trustees of
Superior Officers Council Benefits Funds of New York
City Police Department,

Defendants.

FILED

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-----x
JOAN A. MADDEN, J.:

In this action seeking to recover monies for allegedly unpaid leave benefits acquired by plaintiff during her employment with the defendant Board of Trustees, defendants move to dismiss the complaint on the grounds that it was not timely commenced and/or based on a release executed by plaintiff in connection with the settlement of a prior action. Plaintiff opposes the motion and cross moves for a default judgment against defendants based on their failure to answer, move or otherwise respond the complaint or, in the alternative, for summary judgment on the complaint.

While it appears from the record that the action was not properly commenced due to certain defects in service, including plaintiff's failure to indicate on the affidavits of service the person or entity being served and the type of document served, such defects do not provide a basis for dismissal under the circumstances here even though more than 120 days has passed since the commencement of this action.

Under CPLR 306-b, a plaintiff has 120 days after commencement of an action to serve a

defendant. If service is not made during that time period, “the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.” See CPLR 306-b. To demonstrate “good cause” under the statute a plaintiff must make a threshold showing that he made reasonably diligent attempts at service. Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 104 (2001). Here, plaintiff has made a sufficient showing a reasonable diligent attempts at service such that dismissal is not appropriate and the court shall extend her time for service.

Next, it cannot be said at this juncture that defendant is entitled to dismiss the complaint based on plaintiff’s execution of a release in a prior action. On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

“[I]t is firmly established that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties.” Skluth v. United Merchants & Mfrs., Inc., 163 AD2d 104, 106 (1st Dept 1990)(internal quotation omitted). However, in this case, the statements in plaintiff’s affidavit and the documentary evidence raise issues of fact as to whether the release was intended to encompass the claims in this action. In particular, plaintiff states that the prior proceeding was limited to defendants’ refusal to make a mandatory contribution to her pension fund and her understanding is supported by a September 23, 2010 letter sent to defendants’ counsel by plaintiff during settlement negotiations and the summons with endorsed complaint filed in the Civil Court of the City of New York.

Next, a complaint will not be dismissed based on release where there a factual question as to “whether the release is void as procured under duress or unconscionable circumstances.” Gibli v. Kadosh, 279 AD2d 35, 40 (1st Dept 2000). Here, plaintiff’s statements that she notified counsel for the defendant Board of Trustees that she was represented by her brother, who is an attorney, but that counsel continued to negotiate exclusively with her raises factual questions as to the circumstances surrounding the procurement of the release, as does a comparison of the limited nature of claims raised in the Civil Court action with the broad language of the relevant release. See Bloss v. Va’ad Harabonim of Riverdale, 203 AD2d 36, 37 (1st Dept 1994).

At the same time, however, plaintiff has not demonstrated her entitlement to summary judgment with respect to the release or her entitlement to relief under the complaint. Accordingly, plaintiff’s cross motion for summary judgment is also denied.

In view of the above, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

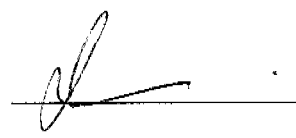
ORDERED that plaintiff's cross motion for a default judgment and for summary judgment is denied; and it is further

ORDERED that plaintiff's the time to serve defendants is extended for an addition 30 days from the date of entry of this decision and order; and it is further

ORDERED that defendants shall serve an answer to the complaint within 20 days of service of the summons and complaint; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, on June 27, 2013 at 9:30 am.

DATED: April 4, 2013



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

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