

Belfer v Travelers Ins. Co.

2013 NY Slip Op 32784(U)

October 31, 2013

Sup Ct, New York County

Docket Number: 100603/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 12

Index Number : 100603/2011
BELFER, SHIRA G.
vs.
TRAVELERS INSURANCE ET. AL
SEQUENCE NUMBER : 007
VACATE

INDEX NO. 100603/11
MOTION DATE _____
MOTION SEQ. NO. 007

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 55

Answering Affidavits — Exhibits _____ | No(s). 57-67

Replying Affidavits _____ | No(s). 71

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/31/13

[Signature]

J.S.C.
BARBARA JAFFE
J.S.C.

- 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 12

-----X
SHIRA G. BELFER,

Plaintiff,

-against-

Index No. 100603/11

Motion seq. no. 007

DECISION & ORDER

TRAVELERS INSURANCE COMPANY a/k/a
Travelers Indemnity Company, a/k/a Travelers Casualty
and Surety Company, a/k/a The Farmington Casualty
Company, VICTORIA OWNERS CORP., VIRGINIA
MANNING, F&L CLAIMS SERVICE, INTERSTATE
INDEMNITY CO., JOHN DOE INDEMNITY
COMPANY,

Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiff, self-represented:

Shira G. Belfer
600 Columbus Ave., #13A
New York, NY 10024
212-243-1572

For Travelers:

Jeremy Sokop, Esq.
Lazare Potter & Giacovas LLP
875 Third Ave., 28th Fl.
New York, NY 10022
212-758-9300

By amended notice of motion, plaintiff moves for an order vacating a stipulation of discontinuance in favor of defendant Travelers Insurance Company (Travelers). Travelers opposes.

By stipulation dated February 9, 2010, plaintiff discontinued without prejudice her claims against Travelers. The stipulation is signed on plaintiff's behalf by her attorney, who subsequently withdrew from representing her. (NYSCEF 38).

Plaintiff argues that her attorney did not tell her about the discontinuance and that she would not have agreed to it, and denies that she had a reason to discontinue against Travelers as

she neither settled with Travelers nor received any settlement funds from it. (Affidavit of Shira G. Belfer, dated Aug. 16, 2013 [Belfer Affid.]).

Travelers agrees that there was no settlement or release. Rather, it alleges that it paid plaintiff all sums due her under her homeowner's insurance policy, as evidenced by three checks that appear to have been cashed by plaintiff. Defendant contends that the remaining claims for structural damage and medical bills are not covered by the policy, which covers only damage to the premises, damage to plaintiff's personal property, and loss of use. It also argues that it reasonably believed that plaintiff's counsel had authority to act on plaintiffs's behalf in discontinuing the action, that plaintiff must commence a plenary action in order to contest the stipulation rather than seeking to vacate it here, that plaintiff unduly delayed in moving to vacate, and that plaintiff has not met her burden for vacating the stipulation. (NYSCEF 57).

Plaintiff denies that Travelers's payments cover her damages or that her remaining claims are not covered by the policy, and thus argues that her attorney improperly or erroneously agreed to discontinue against Travelers. She also denies that her attorney had apparent or actual authority to discontinue without her permission, and contends that Travelers's actions have added to her damages and aggravated her personal injuries. (Reply Affidavit, dated Sept. 24, 2013).

Stipulations of settlement are favored by the courts and are not lightly set aside. (*Hallock v State*, 64 NY2d 224 [1984]). Strict enforcement of stipulations results in efficient dispute resolution and management of court calendars and preserves the integrity of the litigation process. (*Id.*). The party seeking to set aside the stipulation has the burden to demonstrate good cause sufficient to justify setting it aside. (*McCoy v Feinman*, 99 NY2d 295 [2002]).

Generally, moreover, party must commence a plenary action to obtain an order vacating

or modifying a stipulation of settlement (*see Village of Greenwood Lake v Mtn. Lake Estates Inc.*, 189 AD2d 987 [3d Dept 1993], *lv denied* 81 NY2d 1006 [as proceeding was terminated by entry of judgment according to terms of stipulation, sole remedy was to bring plenary action to set stipulation aside]), even if the party raises an issue as to its counsel's authority to enter into the stipulation (*Hallock*, 64 NY2d at 70-71).

As the stipulation of discontinuance terminated the action against Travelers (*see eg Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51 [1979] [settlement agreement does not terminate action unless there has been express stipulation of discontinuance or entry of judgment]), a plenary action is required (*id.* [if action terminated, party must commence plenary action to enforce or modify settlement]; *Town of Carmel v Melchner*, 105 AD3d 82 [2d Dept 2013] [plenary action appropriate when action was terminated by stipulation of discontinuance]; *Church Extension Plan v Harvest Assembly of God*, 79 AD3d 787 [2d Dept 2010] [when party seeks to set aside, invalidate, or modify stipulation of settlement, plenary action required]; *Zeer v Azulay*, 50 AD3d 781 [2d Dept 2008] [defendants' request to rescind stipulation settling action required plenary action]; *Hotel Prince George Affiliates v Grimbilas*, 241 AD2d 302 [1st Dept 1997], *lv denied* 91 NY2d 887 [1998] [as stipulation of discontinuance had been filed, actions were terminated and stipulation could only be set aside in plenary action]; *cf Crecca v Narofsky*, 41 AD3d 216 [1st Dept 2007] [petitioner not required to commence plenary action as parties never executed stipulation of discontinuance nor entered judgment]).

Even if plaintiff could seek to vacate the stipulation here, she has failed to establish that her former attorney lacked apparent authority to stipulate, as he represented her during the litigation for approximately two years, filed and defended motions in the action, and appeared at

[* 5]

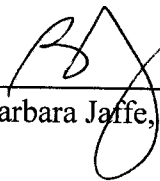
four discovery conferences on her behalf. (*See Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819 [2d Dept 2007] [employment of attorney to represent plaintiff throughout litigation and appear on her behalf at pretrial conference precludes argument that attorney lacked authority to bind her to settlement]; *Bubeck v Main Urology Assocs., P.C.*, 275 AD2d 909 [4th Dept 2000] [as attorney had lengthy involvement in case, including engaging in settlement negotiations and appearing at pretrial conferences, he had apparent authority to enter into stipulations as matter of law]).

In light of this result, I need not address the parties' remaining contentions.

Accordingly, it is hereby

ORDERED, that plaintiff's motion to vacate the stipulation of discontinuance is denied without prejudice to the commencement of a plenary action.

ENTER:



Barbara Jaffe, JSC

DATED: October 31, 2013
 New York, New York