Powell v Adler
2014 NY Slip Op 33120(U)
June 26, 2014
Supreme Court, Queens County
Docket Number: 13707/13
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS Part 6**
Justice

HERMINE POWELL,
Plaintiff,

-against-

MERYL ADLER and HEATHER ADLER,
Defendants.

Index No. 13707/13

Motion
Date May 13, 2014

Motion Cal. No. 98

Motion Seq. No. 2

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Numbered

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Upon the foregoing papers it is ordered that the branch of the motion by defendants, Meryl Adler and Heather Adler for leave to renew the prior order of this Court dated March 31, 2014 is hereby granted as the prior order dated March 31, 2014 was denied without prejudice with leave to renew upon "presentation of a copy of the Release upon which the instant motion is predicated and compliance with the CPLR". As defendants have now submitted a copy of the Release, the branch of the motion seeking leave to renew is granted.

Upon renewal, those branches of defendants' motion seeking summary judgment dismissal pursuant to CPLR 3211(a)(5) and 3212 are hereby denied as follows:

That branch of the motion by defendants, Meryl Adler and Heather Adler to dismiss plaintiff, Hermine Powell's Complaint as against them pursuant to CPLR 3211(a)(5) on the grounds that the plaintiff is barred by the General Obligations Law from commencing this action based on a fully executed general release and settlement reached between the plaintiff and the defendants prior to commencement of this action is denied.

The underlying action arises out of a motor vehicle accident occurring on February 15, 2013. Plaintiff, Hermine Powell maintains that she sustained serious personal injuries as a result of defendants' negligence.

Defendants move pursuant to CPLR 3211(a)(5) which states that dismissal may be granted on the grounds that "the cause of action may not be maintained because . . .of release . .".

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. (*Leon v. Martinez*, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (*see*, CPLR 3211[a][7]; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998]).

The motion is grounded in the "release" language in the document titled "FULL RELEASE OF ALL CLAIMS AND DEMANDS."

"The general rule is 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'" (*Thailer v. LaRocca*, 174 AD2d 731, 733, quoting *Appel v. Ford Motor Co.*, 111 AD2d 731, 732). Where the language with respect to the parties' intent is clear and unambiguous, it will be given effect, regardless of one party's claim that she intended something else (*see, DeQuatro v. Zhen Yu Li*, 211 AD2d 609; *Thailer v. LaRocca, supra*; *Falconieri v. A&A Discount Auto Rental*, 262 Ad2d 446 [2d Dept 1999]). However, "[a] patient who lacks the requisite mental capacity to enter into a contract cannot be a party to a valid release" (*Fleming v. Ponziani*, 24 NY2d 105 [NY 1969]).

Via the affidavit of Gail Pennasilico, a Claims Adjustor from Progressive Northern Insurance Company, the insurer for defendant, Meryl Adler, defendants established a prima facie case that plaintiff signed a release, releasing defendants from any liability in this case and from any liability regarding the subject motor vehicle accident. However, the Court finds that the plaintiff's own affidavit, alleges fraud in the procurement of the release.

In *Farber v. Breslin*, 47 AD3d 873 [2d Dept 2008], the Appellate Division, Second Department held that:

> While the plaintiff's execution of the release in favor of the defendants was "a jural act of high significance" (*Mangini v McClurg*, 24 NY2d 556, 563, 249 NE2d 386, 301 NYS2d 508 [1969]), a motion to dismiss should be denied where fraud or duress in the procurement of the release is alleged (*see Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217, 333 NE2d 163, 371 NYS2d 884 [1975]; *Bloss v Va'ad Harabonim of Riverdale*, 203 AD2d 36, 37, 610 NYS2d 197 [1994]; *Anger v Ford Motor Co., Dealer Dev.*, 80 AD2d 736, 437 NYS2d 165 [1981]). Here, the allegations of fraud were sufficient to support a possible finding that the release signed by the plaintiff was obtained "under circumstances which indicate unfairness" (*Gibli v Kadosh*, 279 AD2d 35, 41, 717 NYS2d 553 [2000] [internal quotation marks and citation omitted]; *see Steen v Bump*, 233 AD2d 583, 584, 649 NYS2d 731 [1996]).

Accordingly, as fraud has been alleged by plaintiff, the branch of the motion for summary judgment pursuant to CPLR 3211(a)(5) is denied.

That branch of the motion by defendants to dismiss plaintiff, Hermine Powell's Complaint as against them pursuant to CPLR 3212, on the grounds that the plaintiff is barred by the General Obligations Law from commencing this action based on a fully executed general release and settlement reached between the plaintiff and the defendants prior to commencement of this action is hereby denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion

for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendants established a prima facie case in support of this branch of the motion. In support, defendants present, inter alia, the affidavit of Gail Pennasilico, a Claims Adjustor from Progressive Northern Insurance Company, the insurer for defendant Maryl Adler, wherein Ms. Pennasilico avers, inter alia, that: on February 18, 2013, the plaintiff agreed to meet her on February 18, 2013 of her own volition, both parties agreed to settle and resolve the matter for $3000.00, plaintiff stated that she would not file a lawsuit against defendants as a result of the accident, she showed plaintiff a Release, which she read over with her and explained to plaintiff that the Release would Release defendants from any liability in this case, she explained to plaintiff that once she signed the Release she would no longer be able to sue the defendants regarding the subject motor vehicle accident, plaintiff said she understood and that she had no plans to sue the defendants, she advised plaintiff that she did not have to sign the document if she did not want to, plaintiff stated that she understood and signed it, and "[t]here was no duress, illegality, fraud or mutual mistake involved in the signing of the Release by Ms. Powell. It was signed with her full understanding of the consequences."

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff presents inter alia, the affidavit of plaintiff herself, wherein she avers, inter alia, that:

> "On February 18, 2013, only three days after my accident, Ms. Pennasilico came to my home. She asked me some questions about the accident. I tried to answer them, but I was

not feeling well, had still been taking the medication and was very tired. I told Ms. Pennasilico all of that. 'She said I see that you are tired and in pain and I will not be long'.

She asked me how much money I wanted for my inconvenience. I told her a number and she then offered me a lower number. We eventually agreed on three thousand dollars. Ms. Pennasilico stated numerous times that the money was just for my inconvenience. She said it was not for any injuries, pain or suffering. Nor did she say it was for any injuries that might arise later due to the accident. She wanted me to sign a piece of papers before giving me the check. She did not say that by signing the papers I would not be able to bring a lawsuit as a result of the accident.

My daughter Kayann Darby arrived in the middle of the meeting. My daughter looked at the Release and asked Ms. Pennasilico some questions. Ms. Pennasilico told her the money was just for my inconvenience did not include any pain and suffering.

Based upon Ms. Pennasilico's statements, I signed the papers and was handed a check for three thousand dollars.

Immediately after Ms. Pennasilico left, I had some more questions and mixed feelings about the paper. My daughter ran outside to get the lady, but she had already left.

I called Ms. Pennasilico on the phone several times, but she never picked up. I left some voice messages, but she did not return my call for several days.

I never intended to give up my legal right to sue. I feel that Ms. Pennasilico lied to me and took advantage of me. As it was only three days after the accident, I was still seeking medical treatment for my neck and back pain and did not know exactly what

> injuries I had sustained yet. I later learned that I had sustained disc herniations and bulges in my neck and back and would undergo shoulder surgery."

As triable issues of fact exist regarding, inter alia, whether there was any fraud in the procurement of the Release (*see, Bronson v. Hansel*, 16 NY3d 850 [NY 2011][whereby the Court held that a Release may be set aside when it was not "fairly and knowingly made"), a trial is necessary and summary judgment is warranted.

Accordingly, that branch of the motion seeking summary judgment pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the Court.

Dated: June 26, 2014

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Howard G. Lane, J.S.C.