Pacheco v 32-42 55th St. Realty LLC
2015 NY Slip Op 31317(U)
January 29, 2015
Supreme Court, Queens County
Docket Number: 9773/14
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

GALO PACHECO,

Plaintiff,

-against-

32-42 55TH STREET REALTY LLC and
B. GREEN CONSTRUCTION CORP.,

Defendants.

Index No. 9773/14

Motion
Date December 3, 2014

Motion
Cal. No. 111

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants to dismiss plaintiff, Galo Pacheco's Complaint as against them pursuant to CPLR 3211(a)(5) on the grounds that the plaintiff is barred 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 fall from a construction site on June 16, 2014 at the premises located at 32-42 55th Street, Woodside, New York 11377. Plaintiff maintains that he 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 "GENERAL RELEASE."

"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 Raja Rizwan, president of R & S Construction Corp., New City Bridging Corp., and New City Carting Corp., defendants established a prima facie case that plaintiff signed a release, releasing defendants from any liability "[r]elating to any and all injuries suffered at 32-42 55th Street, Woodside, New York 11377 on June 16, 2014."
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, the motion for summary judgment pursuant to CPLR 3211(a)(5) is denied.

Plaintiff's cross motion to void the Release is 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]).

Plaintiff established a prima facie case in support of the cross motion. In support, plaintiff presents, inter alia, the affidavit of plaintiff himself, wherein he avers that:

> On or about July 2, 2014, just one week after I was discharged from the hospital, Raja and another man came to my house and talked to me about my accident, how I was feeling, and asking how I would support myself while I could not work. I told them that I was still in severe pain, that I had severe headaches, that I was on narcotic pain medication, and was confused about what had transpired and scared about what would happen in the future, and I was incapable of working at that time. I was primarily concerned about how I could support myself as I was physically unable to work. Raja advised me not to worry, that he would give me money now, and when that money ran out, if I was not better and could not work, that he would give me more money. He also referred to my status in this country stating it limited my options, and that it would in my best interest to let him help me. I was desperate for money to support myself, and Raja convinced me to accept the money. Raja then told me he needed to keep a record of the money he gave me and made me sign a document which he said was only for his records. I looked at the document but did not understand it, but I believed and relied upon what he told me. At no time was I told that what I was signing was intended to prevent me from suing or seeking compensation for the severe injuries I sustained or for the future effect that the injuries may have upon me. At no time was I told the money I was given was intended to be full payment to compensate me for my injuries, or for my inability to work, or for my medical expenses. To the contrary, I was told it was money to hold me over, to help me survive until I could work again. I was never told that by signing the document that I was giving up my any rights I may have to be compensated for my pain, or lost time from work, or to have my medical bills paid. Had I known that would be the result of my

> signing the document, I would not have signed it.

In opposition to the cross motion, defendants raise a triable issue of fact. In opposition, defendants present, inter alia, the affidavit of Raja Rizwan, president of R & S Construction Corp., New City Bridging Corp., and New City Carting Corp. wherein he avers, inter alia, that:

> "I had several conversations with [plaintiff] regarding our efforts to resolve his claims against all interested parties. I had no difficulty in speaking and communicating with him about his claims. . . .The issues being discussed, the resolution and settlement of all claims from the accident of June 16, 2014 were clearly understood by all involved. In fact, the amount to be paid was changed as a result of these various negotiations. It was clear to [plaintiff] that we were paying him $13,000 to settle all claims and that sum was paid and accepted by [plaintiff]. . . The claims set forth in the Affidavit of [plaintiff] of October 15, 2014, are not true. He understood exactly what the General Release was for . . ."

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, the motion and cross motion are denied.

This constitutes the decision and order of the Court.

Dated: January 29, 2015

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Howard G. Lane, J.S.C.