

**Garriot v O'Neill Condominium Assoc.**

2015 NY Slip Op 31793(U)

September 23, 2015

Supreme Court, New York County

Docket Number: 152530/14

Judge: Kelly O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

-----X  
HUNTLEY GARRIOT and EMILY GARRIOT,

Plaintiffs,

-against-

Index No. 151175/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
HAYDEN HARMAN,

Plaintiff,

- against-

Index No. 151176/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
CHARLES RIFKIND,

Plaintiff,

-against-

Index No. 151196/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
KATHERINE MOSBY,

-against-

Index No. 151367/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
GIULIA CAZZOLA,

Plaintiff,

-against-

Index No. 152530/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
JAMIE SALTER,

Plaintiff,

-against-

Index No. 156652/14

O'NEILL CONDOMINIUM ASSOCIATION, NMC  
PROPERTY MANAGEMENT, LLC, LADIES MILE,  
INC. and OLYMPIC FUNDING, LLC.

Defendants.

-----X  
**KELLY O'NEILL LEVY, J.:**

Motion sequence number 002 in actions bearing index numbers 151175/14, 151176/14,  
151196/14, 151367/14, 152530/14, and motion sequence number 001 in action bearing index  
number 156652/14, are consolidated for disposition.

In each of the above captioned actions, defendant Ladies Mile Inc. (Ladies Mile) moves,  
pursuant to CPLR 3211(a)(5), for an order dismissing the complaint and all cross-claims, on the  
ground that they are barred by a release dated November 23, 2011 (release), or, in the alternative,

for an order dismissing the cross-claims asserted by defendant Board of Managers of the O'Neill Condominiums s/h/a O'Neill Condominium Association (O'Neill Condominium) on the ground that the cross-claims are barred by the release.

Each of the above plaintiffs resides in an apartment at 655 Avenue of the Americas in Manhattan (the property). Defendant O'Neill Condominium is the association charged with maintaining the property. Defendant NMC Property Management LLC (NMC Property) is the property management company hired by O'Neill Condominium to manage the property. Defendant Ladies Mile is the construction company that renovated the property from a department store into a residential condominium. Olympic Funding, LLC (Olympic) is the owner of the ground floor retail commercial space at the property.

Shortly after Ladies Mile turned over management of the building to O'Neill Condominium, a non-party, Rand Engineering & Architecture, P.C., was retained by O'Neill Condominium to put together a list of issues in connection with Ladies Mile's renovation of the property. A resulting construction defect lawsuit, commenced by O'Neill Condominium against Ladies Mile, was settled for the sum of \$15,000.00. On November 23, 2011, as part of the settlement, Ladies Mile and O'Neill Condominium executed the subject release.

These are all identically-pled causes of actions by individual apartment owners to recover damages in tort to their apartments, as the result of a partial "collapse" suffered on December 25, 2012 at the ground floor retail space of the property. Each first cause of action is against O'Neill Condominium for failure to use reasonable care in maintaining the property and supervising the work performed by Ladies Mile. Each second cause of action is against NMC Property for

failure to use reasonable care in maintaining the property and supervising the work performed by Ladies Mile. Each third cause of action is against Ladies Mile for failure to use reasonable care in planning the renovation and failure to use reasonable care in selecting subcontractors. Each fourth and final cause of action is against Olympic for failure to use reasonable care in maintaining the ground floor retail space.

In each case, O'Neill Condominium and NMC Property have cross-claimed against Ladies Mile.

In support of its motions to dismiss, Ladies Mile argues that plaintiffs and defendants O'Neill Condominium and NMC Property, are attempting to litigate claims that were previously released. In opposition to the motions, plaintiffs argue that the motions are premature, plaintiffs did not execute the release, and plaintiffs are not named as parties to the release. In opposition to the motions, O'Neill Condominium argues that it never intended the release to cover future potential claims. In opposition, NMC Property also argues that it did not sign the release.

The November 23, 2011 release provides, in relevant part:

“The O'Neill Condominium, and all of its unit owners and each of their past or present, direct, or indirect, successors, heirs, executors, administrators, assigns, members, owners, grantees and representatives do hereby release and discharge (Ladies Mile) ... from any and all claims ... for, arising out of, or in connection with the Premises, other than the (mechanics lien issues). The foregoing includes, but is not limited to ... any existing or potential claims, controversies, warranties or issues relating to the construction, improvement, installation and/or design of the subject building, the common areas and/or the individual units.”

On a motion brought pursuant to CPLR 3211, the court must afford the pleading a liberal construction, accept the facts as alleged as true, and accord the plaintiff the benefit of every

possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Dismissal of a complaint on the ground of documentary evidence is warranted where the evidence submitted conclusively establishes a defense as a matter of law (*150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 AD3d 1, 5, [1st Dept 2004]).

"[A] valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). A defendant has the initial burden of establishing that it has been released from any claims (*Mangini v McClurg*, 24 NYd 556, 563 [1969]). "A release is a contract, and its construction is governed by contract law" (*Cardinal Holdings, Ltd. v Indotronix Intl. Corp.*, 73 AD3d 960, 962 [2d Dept 2010], quoting *Lee v Boro Realty, LLC*, 39 AD3d 715, 716, [2d Dept 2007] and one "that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Alvarez v Amicucci*, 82 AD3d 687, 688 [2d Dept 2011]).

In support of its motion to dismiss, Ladies Mile proffers a prima facie case that the action should be barred on the ground of release. By presenting the November 23, 2011 release, Ladies Mile meets its initial burden of establishing a defense as a matter of law. Therefore, the burden shifts to plaintiffs, and codefendants O'Neill Condominium and NMC Property, to establish or plead an issue as to whether the release bars this action. In answering this question, obviously a distinction must be made between the signatory O'Neill Condominium, and the non-signatory parties, the individual plaintiffs, and NMC Property.

As described below, because the release disposed of even unripe and contingent claims, clearly O'Neill Condominium has the more difficult hurdle (*Long v O'Neill*, 126 AD3d 404 [1st Dept 2015]). The less difficult question for the Court at the pleading stage is whether the plaintiff individual apartment owners and defendant NMC Property, although clearly referred to in the release, are bound by a release that they did not sign.

The court finds that there is an issue, sufficient to survive a CPLR 3211(a)(5) motion to dismiss, as to whether O'Neill Condominium, by signing the release, effectively released either plaintiffs' claims, or defendant NMC Property's cross-claims (*Newin Corp. v. Hartford Acci. & Co.*, 37 NY2d 211, 217 [1975]). In *Koatz v. 1776 Second Ave. Assocs.*, 244 AD2d 201 (1st Dep't 1997), individual unit owners had the right to bring a defective construction lawsuit after the condominium association settled with the defendant construction company for similar claims. The court found that collateral estoppel was inapplicable since the settlement did not dispose of condominium owners' individual property damage claims and that the association lacked authority to settle such individual claims. Generally, "questions of agency and of its nature and scope ... are questions of fact." *Bostany v Trump Org. LLC*, 73 AD3d 479, 480 [1st Dept 2010] quoting *Fogel v Hertz Intl.*, 141 AD2d 375, 376 [1st Dept 1988]. Whether O'Neill Condominium possessed authority to execute the release as both plaintiffs' and NMC Property's authorized representative is, at the pleading stage, unknown, and must be further litigated.

Turning to the cross-claims by O'Neill Condominium against Ladies Mile, the release is signed by O'Neill Condominium and clearly and unambiguously encompasses unknown claims. Further, it was entered into by counseled and sophisticated parties. However, O'Neill

Condominium argues that the release should be set aside on the ground of mutual mistake because the settlement was not “fairly and knowingly made.” *Mangini v McClurg*, 24 NY2d, 556, 566 [1969], quoting *Farrington v Harlem Sav. Bank*, 280 NY 1, 4 [1939]. It is well-settled law that the precise measure of damages need not be specifically known at the time of the release for the release to be a bar to any claims. In a similar case, *Rector Church Wardens and Vestrymen of St. James Church in Seventh Ward of City of Brooklyn in County of Kings v. City of New York*, 261 AD 614 (2d Dep’t 1941), the church settled a prior case with the City and a contractor following damage to a portion of the church relating to the construction of a subway line. The church furnished the defendants with a general release relative to all claims that concerned the subway construction. Later, the church sustained additional damage relating to the contractors’ failure to properly underpin the church building. The court held that although the church was not aware of the underpinning issue at the time of the release, it was aware of damage caused by the construction and therefore the release was enforceable. In this case, it is undisputed that the release relates to claims asserted in this action and that only traditional grounds for setting aside the agreement such as duress, illegality, fraud or mutual mistake will render it invalid. See *Langhorne v. Amchem Products, Inc.*, 808 N.Y.S.2d 1, 1-2 [1st Dep’t 2005]. In light of the facts in this case, the court finds that the defendant Ladies Mile has met its burden as to O’Neill Condominium Association and dismisses the cross-claims of O’Neill Condominium as against Ladies Mile, Inc.

Accordingly, it is ORDERED that Ladies Mile Inc.’s motions to dismiss in the above-captioned actions are granted only as to the cross-claims of O’Neill Condominium Association;

and it is further


ORDERED that the parties shall proceed with discovery forthwith; and it is further

ORDERED that the parties shall appear in Part 19 for preliminary conference on October 14, 2015, at 9:30 a.m. as previously scheduled.

This constitutes the Decision and Order of the court.

Dated: September 23, 2015

ENTER:

  
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KELLY O'NEILL LEVY, A.J.S.C.

**HON. KELLY O'NEILL LEVY**