

**Caso v Delrosario**

2016 NY Slip Op 32958(U)

June 20, 2016

Supreme Court, Westchester County

Docket Number: 60219/2014

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
STEVEN CASO,

Plaintiff,

-against-

ANTHONY DELROSARIO,

Defendants.  
-----X

INDEX NO. 60219/2014

DECISION/ORDER

Motion Date: 3/23/16

Motion Seq. #1

The following papers numbered 1 through 11 were considered on the motion of Steven Caso ("plaintiff"), seeking to vacate and set aside the Stipulation Discontinuing the action and General Release given to Anthony Delrosario ("defendant"), for sanctions pursuant to 22 NYCRR §130-1.1, and for such other and further relief:

PAPERS

NUMBERED

Order to Show Cause, Affirmation, Exhibits A-F, Exhibits A-B	1 - 8
Affirmation in Opposition	9
Reply Affirmation, Exhibit	10-11

Upon the foregoing papers, the court determines as follows:

Plaintiff claims to have suffered property damage and personal injuries caused by defendant in a "road rage" incident on July 6, 2013 in Greenburgh, New York. The complaint served in this action included causes of action for assault, battery, damage to property and negligence [Ex. A]. According to plaintiff's attorney's affirmation, the negligence claim, for the property damage to his vehicle, was settled with GEICO, defendant's insurer, in the amount of \$6,500., on January 26, 2015. In return, plaintiff delivered a General Release, Stipulation Discontinuing Action with prejudice (emphasis added), and Hold Harmless Agreement as to liens. [Ex. B, letter and enclosures]. The Stipulation was signed by plaintiff's attorney and Cuomo, LLC, as attorneys for defendant,

and apparently the attorney of record for GEICO, but not by John M. Cromwell, Attorney for defendant, who appears for him now. [See Doc. 6, NYSCEF].

On January 26, 2015, plaintiff's counsel sent a separate letter to Cromwell, together with a separate General Release, Stipulation of Settlement with Prejudice (signed by plaintiff), and W9 Form (Ex. C). This was in purported settlement of the intentional tort claim for \$2,500 which would not be covered by the GEICO policy. None of these papers were returned to plaintiff's attorneys. On March 6, 2015, a discussion is alleged to have taken place between the parties' attorneys relative to the payment of the \$2,500, and whether plaintiff would drop criminal charges pending against defendant, as a condition of payment. Plaintiff's attorney states he advised Cromwell that such an arrangement was not legal, and that Cromwell stated he would advise defendant to pay it.

When payment was not forthcoming, plaintiff's attorneys filed a proposed judgment [Ex. D], opposed by Cromwell, who filed an affirmation dated April 17, 2015 stating, inter alia, "(A)lthough verbal settlement discussions were held between plaintiff's counsel and counsel for the defendant, Anthony Delrosario, no formal agreement was reached between the parties." [Doc. 12, NYSCEF, a document not included as an exhibit to either party's submissions]. The judgment was not entered by the Clerk of the Court. Plaintiff alleges the criminal case was disposed of in August, 2015, and he has yet to be paid the \$2,500, which he alleges, was "an express condition" of the settlement, such that there has been a breach of the settlement agreement.

In opposition, Cromwell, in his affirmation, avers he made it clear to plaintiff's attorney that defendant "could not enter any final settlement concerning the civil terms until the criminal case had been resolved." He relies upon the General Release signed by plaintiff and the attorneys for GEICO as proof of final settlement, in that there is no "carve out" for intentional torts. He states there is no probative value to the fact he was sent, under separate letter, settlement documents relative to the \$2,500 figure that were never returned to plaintiff's attorneys, and that there is no proof that a settlement was reached that comports with CPLR § 2104. He denies there was an oral agreement between the parties, or an agreement separate and apart from the settlement with GEICO, or that his client attempted to "extort plaintiff or his counsel."

In reply, plaintiff's attorney points out that Cromwell does not deny he received the separate letter and documents sent on January 26, 2015, or that those papers were never returned by Cromwell on the basis that there was no settlement, or the events he described as having occurred between March and September, 2015.

The court finds that there is an issue of fact as to whether the settlement reached with GEICO was conditioned upon the separate settlement with defendant as a self-insured. Further, this is a case where parol evidence is admissible to assist the court in making a just determination as to whether plaintiff should be relieved of the terms of the General Release and Stipulation of Settlement signed by him and the attorneys for GEICO, as the attorneys of record for defendant. As stated in *Mangini v McClurg*, 24 NY2d 556,

562 [1969], "(T)hus, while it has been held that an unreformed general release will be given its full literal effect where it is directly or circumstantially evident that the purpose is to achieve a truly general settlement, the cases are many in which the release has been avoided with respect to un contemplated transactions despite generality of the language of the release form (citations omitted)." See *Pacheco v 32-42 55<sup>th</sup> Street Realty, LLC*, \_\_\_ AD3d \_\_\_, 2016 WL2726262, 2016 Slip Op 03727 [2d Dept 2016], where the Court stated, "(M)oreover, there is a requirement that a release covering both known and unknown injuries be "fairly and knowingly made" (quoting *Mangini v McClurg, supra at 566*). The Court found plaintiff's allegations were sufficient to support a possible finding that the defendants procured the release by means of fraud and that the release was signed by the plaintiff under circumstances which indicate unfairness.

Consistent with the above case law, the court finds that there are issues of fact as to whether the release and stipulation of discontinuance signed by plaintiff and the attorneys for GEICO, on behalf of defendant, was intended to cover the assault and battery causes of action. The court notes the letter to GEICO and the letter to Crawford, each dated January 26, 2015, did not indicate that each of them received a copy of the other's letter or enclosures. The affirmation submitted by Crawford in opposition to the entry of the judgment does not unequivocally deny that settlement discussions were ongoing. So too, the retention of the documents sent to Crawford on January 26, 2015, rather than the rejection and return of same, may have relevance to the issues. Likewise, the failure of plaintiff's attorneys to provide a "carve out" in the release given to GEICO is of relevance.

Based upon these findings, the court determines that a hearing must be conducted where testimony, and other proof, may be offered to resolve the issues. The burden is on plaintiff to demonstrate his entitlement to the relief he seeks. If he is successful, the settlement with GEICO, as to the negligence claim covering the property damage to plaintiff's vehicle, will nonetheless stand. It is the ruling of this case that in the event plaintiff is successful in carrying his burden, then he will have the opportunity to prove he was injured as a result of the intentional torts he alleges were committed against him by defendant.

The application by plaintiff for the imposition of sanctions, pursuant to 22 NYCRR §130-1.1, is denied. The court has identified issues of fact that must be resolved and that have been raised in good faith by the parties, that do not justify a finding of frivolous conduct on the part of defendant.

ORDERED that the application of plaintiff Steven Caso to set aside and vacate the General Release, and the Stipulation of Settlement with Prejudice, is granted, to the limited extent that a hearing shall be conducted relative to the issues raised by the parties' submissions on this motion, as considered by the court in the determination of this motion; and it is further

ORDERED that application of plaintiff Steven Caso, for the imposition of sanctions, is denied; and it is further

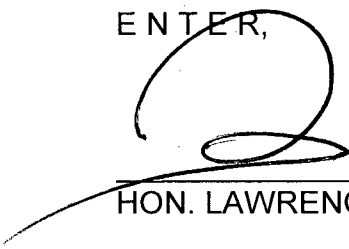
ORDERED that the demand for such other and further relief is denied, as there is none applicable; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811, on July 25, 2016 at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
June 26, 2016

ENTER,

  
HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

Joseph T. Mullen, Jr. & Associates/Plaintiff  
Via NYSCEF

John M. Cromwell, Esq./Defendant  
Via NYSCEF

Cuomo, LLC  
Via NYSCEF