

Ortega v Martinez
2018 NY Slip Op 30514(U)
February 5, 2018
Supreme Court, Queens County
Docket Number: 710465/16
Judge: Leslie J. Purificacion
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

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JUAN ORTEGA and JUAN TORIS,

Index
Number 710465/16

Plaintiffs,

-against-

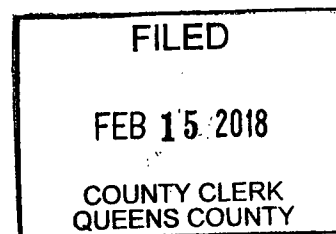
Motion Seq. #1

REYNA MARTINEZ and ADRIAN
MARCHETTI,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant REYNA MARTINEZ to dismiss the complaint pursuant to CPLR 3211 (a)(5), and cross-motion by plaintiffs for an order nullifying and vacating signed general releases.

	<u>PAPERS NUMBERED</u>
O.S.C., Aff., Exhibits and Service.....	1-4
N.C.M., Aff., Exhibits and Service.....	5-8
Opp./Reply and Service.....	9-10
Reply and Service.....	11-12



Upon the foregoing papers, it is ordered that the motion and cross motion are decided as follows:

Plaintiffs commenced this action on or about August 31, 2016, to recover for personal injuries allegedly sustained in a motor vehicle accident that occurred on May 3, 2016. Defendant Reyna Martinez now moves to dismiss the complaint on the grounds that on May 5, 2016, plaintiff Juan Toris executed a general release for the sum of \$800.00, and on same date plaintiff Juan Ortega executed a general release for the sum of \$750.00. Plaintiffs cross move for an order nullifying and vacating the

general releases on the grounds of fraud, misrepresentation, mutual mistake, duress and illegality.

In support of the motion, movant submits, inter alia, copies of the general releases as well as copies of the cashed checks. In addition, movant submits the sworn affidavits of Nailah Waters and Gina Serrano, both of whom are employed by defendant's insurance carrier.

Ms. Waters states in her sworn affidavit that she was the assigned claims representative for the matter and that on May 5, 2016, she met with plaintiffs Juan Ortega and Juan Toris for the purpose of interviewing them. She further states that present at that time was Gina Serrano, another employee of the carrier, who translated the discussion from English to Spanish and Spanish to English. She states that after a full discussion of the facts and circumstances of the accident and a negotiation for payment with each plaintiff, they signed the general releases after it was translated to them from English to Spanish by Ms. Serrano. In a sworn statement, Ms. Serrano-Loiseau avers that she is an employee of defendant's insurance carrier and that on May 5, 2016, she accompanied Nailah Waters to interview plaintiffs; that she translated the conversations as well as the general releases that plaintiffs signed in her presence and that each acknowledged that they wanted to settle their claims. Defendant asserts that the general releases are binding and the complaint must be dismissed.

Plaintiffs cross move to nullify and vacate the releases on the grounds of fraud, misrepresentation, mutual mistake, duress and illegality. In support of the motion, plaintiffs each submit an affidavit (in both English and Spanish with an affidavit of translation) and various medical records.

Plaintiff Juan Ortega states in his sworn affidavit that defendant Reyna Martinez told him that he should speak to her lawyer who would help him. He states that on May 5, 2016, two women met with him in his home; one of which spoke English and the other translated in Spanish and who he believed were attorneys. He claims that he was told that if he did not have a social security number he had to sign [the release]. He further claims that he was not told that he would be waiving his right to sue for his injuries in exchange for the \$750.00. He states that the release was not translated for him and that he would not have signed it had he known what it meant. He further avers that he did fully realize the extent of his injuries until after the meeting, and claims that as a result of the accident he suffered a fracture to his sternum and herniations to his lumbar and thoracic spine.

In an almost identically worded affidavit, plaintiff Juan Toris states he signed the release because he was told if he did not have a social security number he had to sign it; that he was not told he was waiving his right to sue in exchange for the \$800.00; the release was not translated to him; and, he would not have signed it had he know what it meant. He also did not fully realize the extent of his injuries until after the meeting. As a result of the accident, he claims to have suffered tears to his left shoulder that required surgery, a tear to his right shoulder and left knee and injuries to his neck, back and right knee.

"In general, a release will not be set aside in the absence of duress, illegality, fraud or mutual mistake" (Haynes v Garez, 304 AD2d 714, 715 (citations omitted)). "However, there is a requirement that a release covering both known and unknown injuries be 'fairly and knowingly made' (Id., citing Mangini v McClurg, 24 NY2d 556, 563,

quoting Farrington v Harlem Sav. Bank, 280 NY 1,4). This requirement may be applied in situations 'failing far short of actual fraud' such as when, 'because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party'" (Mangini at 567).

Plaintiffs were approached by the insurance agents two days after the accident. Defendant submits no evidence that at that time the nature or extent of the plaintiffs' injuries were known. With respect to Mr. Ortega, purported herniations to his cervical and thoracic spine, as well as a fracture in his mid sternum were first diagnosed by MRI in May 2016. Similarly, MRI studies of Mr. Toris conducted in May 2016, reveal purported thoracic and cervical herniations. MRI studies conducted in June 2016, reveal purported tears in both Mr. Toris's left and right shoulders and in his left knee. While neither plaintiff explains why he negotiated the check tendered to him, review of the checks indicates no notations indicating it was in full settlement of any claims arising out of the accident in issue.

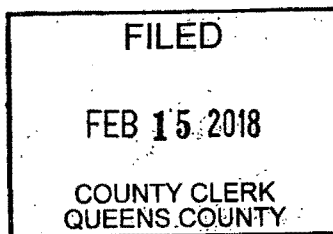
Under these circumstances, it appears to the court that it would be "inequitable to allow the release[s] to serve as a bar to" plaintiff's claims.

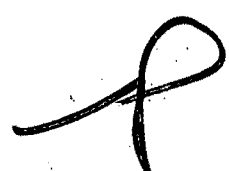
The releases are hereby set aside, on condition that plaintiffs, within 30 days of service upon them of a copy of this order together with notice of entry, repay the sums of money paid to them.

Accordingly, the motion is denied and the cross motion granted as provided for herein.

This is the decision and order of the court.

Date: February 5, 2018




Hon. Leslie J. Purificación, J.S.C.