

Lan Hua Jiang v Starwood Acupuncture, P.C.
2018 NY Slip Op 31540(U)
June 13, 2018
Supreme Court, Queens County
Docket Number: 711916/2016
Judge: Leslie J. Purificacion
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

-----X
LAN HUA JIANG,

Index
Number 711916/2016

Plaintiff,

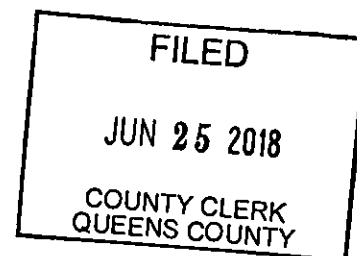
-against-

Motion Seq. #1

STARWOOD ACUPUNCTURE, P.C.,

Defendant.

-----X



The following papers numbered 1 to 10 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a)(5).

**PAPERS
NUMBERED**

N.M., Aff., Exhibits and Service.....	1-4
Aff in Opp., Exhibits and Service.....	5-7
Reply, Exhibits and Service.....	8-10

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

Plaintiff commenced this action for personal injuries sustained as a result of an alleged improper acupuncture treatment rendered by the defendant on September 17, 2016. Defendant Starwood Acupuncture, P.C. (hereinafter "Starwood") now moves to dismiss the complaint pursuant to CPLR 3211(a)(5) claiming that the plaintiff executed a release for the sum of \$900.00, wherein she agreed to give up any and all claims and rights against the defendant.

In support of the motion, movant submits an affidavit from Hyoung Gyo Kim, president of defendant Starwood, annexed as Exhibit "C", wherein he states plaintiff received cosmetic acupuncture treatments at defendant's facility on August 2, 2015,

September 3, 2015 and September 17, 2015. Mr. Kim further states that plaintiff claimed she developed an infection as result of her treatment on September 17, 2015. Mr. Kim alleges that it had been explained to plaintiff that infection is a possible risk of acupuncture and that they received informed consent from the plaintiff prior to the start of her treatments. Mr. Kim avers that as a sign of good-faith, he resolved the issue by entering into an agreement on December 8, 2015, whereby plaintiff released and gave up all claims and rights against Starwood. Mr. Kim asserts that the release agreement was truthfully and accurately explained to plaintiff in Korean and that plaintiff understood the contents of the release agreement. Mr. Kim alleges that plaintiff stated that she would not sign the agreement until she received the \$900.00 in cash. Mr. Kim also stated that he also made arrangement for a doctor, Dr. Tae Won Moon, to provide medical treatments to plaintiff at no cost to the plaintiff.

Defendant also submits, as Exhibit "B", a copy of the release agreement between the parties. The agreement which bears "Refund Agreement" at the top in large bold letters, states that the parties are entering into the agreement to resolve claims that were asserted or could be asserted. It further states that Starwood shall pay \$900.00 to patient as a refund for cosmetic acupuncture treatment and that plaintiff, in consideration of said refund, agrees to accept the medical treatment provided by medical professionals commissioned by Starwood. There is also a paragraph 4, which clearly states that the plaintiff agrees to release any and all claims, including those which the parties are not aware or mentioned in the agreement. The agreement is signed by the plaintiff and someone from Starwood.

In opposition to the motion, plaintiff claims that the release was signed due to

fraud and duress. Plaintiff submits an affidavit, annexed as Exhibit "A", where she claims that she speaks and reads in Korean. She claims that she speaks very little English and cannot read it. Plaintiff claims that in August of 2016, she paid Starwood \$900.00 to give her acupuncture treatments on her face to reduce wrinkles. She claims that during one of the sessions, 'Starwood' caused a growth on her face that was continuously getting worse. Plaintiff claims that she was never told that this could happen and she was very afraid. Plaintiff attaches photos, as Exhibit "B", which she claims accurately depicts the infection. Plaintiff asserts that the acupuncturist told her he would refund her money and send her to a doctor for treatment of the growth. She further asserts that the acupuncturist explained briefly and in Korean that he would only refund the money and fix the growth if she signed the paper. Plaintiff alleges that she did not and would not waive her right to bring a lawsuit against Starwood and that she only signed the document because she was told it was necessary to receive a refund. Plaintiff concluded that she believes Starwood lied about the treatment and tricked her into signing the paper.

In reply, defendant argues that plaintiff has failed to establish the basic elements of fraud. Defendant further argues that even if defendant had failed to explain the release provision, plaintiff's reliance upon an employee of Starwood to translate the document was not justified. In addition, defendant avers that the plaintiff has also failed to establish duress and that she was forced to sign the agreement. Defendant annexes another affidavit from its president Hyoung Gyo Kim, who claims that he never pressured the plaintiff to sign the agreement and that she was free to take the agreement home for translation.

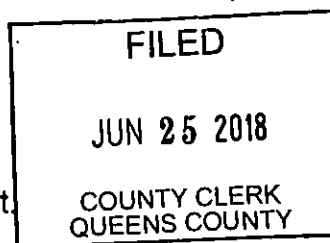
"In general, a release will not be set aside in the absence of duress, illegality, fraud or mutual mistake" (Haynes v Garex, 304 AD2d 714, 715 (citations omitted)). To avoid a release on the ground of fraud, a party must allege every material element of that cause of action. In addition, a party will not be excused from her failure to read and understand the contents of a release. A party who signs a document, who is illiterate in the English language, must make a reasonable effort to have the contract read to them or provide a valid excuse for having failed to read it (see Shlovskiy v. Khan, 273 A.D.2d 371). However, if a signer is unable to read English and the contents are misread or misrepresented to the signer by the other party, unless the party is negligent, the writing is void (see Pimpinello v Swift & Co., 253 N.Y. 159).

In the instant matter, the parties having conflicting affidavits as to whether the "Refund Agreement" was accurately translated to the plaintiff. While defendant annexes an affidavit from its president, Mr. Kim does not state how he knows that the agreement was truthfully and accurately explained to the plaintiff. It is also unclear from Mr. Kim's affidavit who translated the agreement and whether Mr. Kim was present for the translation. In her affidavit, plaintiff asserts she felt "lied to" and "tricked" into signing the agreement. As such, there are issues of fact as to whether plaintiff knowingly and voluntarily entered into this agreement and whether the release provision of the refund agreement was misrepresented to her.

Accordingly, the motion is denied.

This is the decision and order of the court.

Date: **JUN 13 2018**



Hon. Leslie J. Purificacion, J.S.C.