

Castillo v Red Spa Nail Inc.

2018 NY Slip Op 32226(U)

August 21, 2018

Supreme Court, Kings County

Docket Number: 503789/2015

Judge: Carolyn E. Wade

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At Part 84 of the Supreme Court of
the State of New York, held in and
for the County of Kings, at the
Courthouse, located at Civic Center,
Brooklyn, New York on
the 21st day of August 2018

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X
WINDY CASTILLO and ALDONSA CASTILLO,

Plaintiffs,

Seq. 4

Index No. 503789/2015

-against-

DECISION and ORDER

RED SPA NAIL INC. D/B/A RED SPA NAIL SALON,
CONSTANTINO G. SARNI, CITY OF NEW YORK and
NEW YORK CITY DEPARTMENT OF
TRANSPORTATION,

Defendants.

-----X

**Recitation, as required by CPLR § 2219(a), of the papers considered in the review of
Plaintiffs' Cross-Motion:**

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1 _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	2 _____
Reply Affidavits/Affirmations.....	3 _____
Memorandum of Law.....	_____

Upon the foregoing papers and after oral argument, plaintiff Windy Castillo and Aldonsa Castillo ("Plaintiffs") cross-move for an Order: 1) entering judgment against defendant Red Spa Nail Inc. d/b/a Red Nail Salon ("Salon") in the sum of \$120,000.00, as twenty-one days have accrued since Plaintiffs' tender of the release against defendant; and 2) denying Salon's Motion¹ to Strike the Note of Issue.

The underlying action was commenced by Plaintiffs to recover damages against defendants Salon, Constantino G. Sarni ("Sarni"), City of New York and New York City Department of Transportation, for personal injuries that Windy Castillo allegedly sustained on February 13, 2014, when she slip and fell on the sidewalk in front of Salon's store.

By Order of the Hon. Francois Rivera, JSC, dated April 4, 2018, and signed by the appearing parties, all claims and cross-claims against defendants City of New York and New York City Department of Transportation were discontinued with prejudice. Sarni failed to answer the pleadings. As a result, Justice Genovesi signed a default judgment order, dated April 22, 2016, which directed that an inquest to be held at the time of trial.

While discovery was underway, Plaintiffs and Salon agreed to settle the matter for \$120,000. However, differences arose between the parties as to the terms of the proposed release that was drafted by Salon. The instant motion ensued.

In support of the instant application, Plaintiffs note that Salon sent it a stipulation of

¹ By Order, dated April 4, 2018, Justice Rivera resolved Defendant Red Spa Nail, Inc's underlying motion to vacate the note of issue, by ordering Plaintiff's IME to be noticed within 45 days, and held within 45 days of the notice. **The ruling further indicated that the Note of Issue would not be stricken. Thus, this branch of the instant cross-motion is rendered moot.**

discontinuance, dated November 6, 2017, and a proposed release. However, the release indicated that Sarni would be released from liability. Plaintiffs refused to signed the release on the grounds that Salon did not represent Sarni, and that they had already obtained a default judgment order against him. They subsequently tendered to Salon their own duly executed release and stipulation of discontinuance on February 7, 2018; yet, their adversary did not pay the settlement within twenty-one (21) days of receipt, pursuant to CPLR § 5003-a. Plaintiffs now seek a judgment against Salon for \$120,000.

Salon, in opposition, argues that it did not sign the release proffered by Plaintiffs, as it was deemed unacceptable. To buttress its averment, Salon's counsel annexes a copy of a February 20, 2018 letter that it sent to Plaintiffs' attorney, which memorializes the rejection of the proposed release (Exhibit "A" of Salon's opposition). Salon asserts that after Plaintiffs refused to sign its release, the parties began to negotiate a resolution, including increasing the agreed upon \$120,000 offer. Salon contends that since both parties disagreed about the release language, a settlement was not in place.

In rebuttal, Plaintiffs maintain that their proposed release and stipulation of discontinuance contained the settlement terms agreed to by the parties, but excluded defaulting defendant Sarni. Since more than twenty-one (21) days have accrued since Plaintiffs' tender of the settlement documents to Salon, they request that the court enter a judgment against defendant Salon for \$120,000 plus interest, costs, and disbursements.

CPLR § 5003-a (a) provides, in relevant part, that:

When an action to recover damages has been settled, any settling defendant...shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff.

Moreover, CPLR § 2104 states:

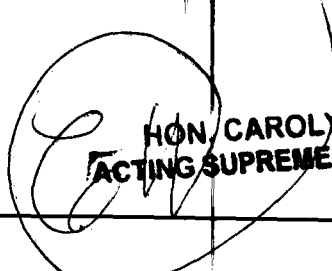
An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

In the instant case, an examination of the release drafts between Plaintiffs' and Salon's counsel discloses that the two parties disagreed over the substantive terms of the settlement; particularly regarding the release of Sarni from this action. Salon's February 20, 2018 written rejection of Plaintiffs' proffered settlement documents further evidences that the matter has not settled (*See Curcio v J.P. Hogan Coring & Sawing Corp.*, 303 AD2d 357, 358-359 [2d Dept

2003)). Consequently, this Court determines that this action has not settled within the purview of CPLR § 5003-a (a) and CPLR § 2104.

Accordingly, based upon the above, Plaintiffs' Cross-Motion to Enter Judgment against Salon, *inter alia*, is **DENIED**. Furthermore, as the Note of Issue would not be stricken pursuant to Justice Rivera's order dated April 4, 2018, that branch of Plaintiff's Cross-Motion is **DENIED** as moot.

This constitutes the Decision and Order of the court.


HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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ACTING SUPREME COURT JUSTICE

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