

Shemkover v City of New York
2020 NY Slip Op 31108(U)
April 30, 2020
Supreme Court, New York County
Docket Number: 157266/2012
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

DMITRI SHEMKOVER,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY HOUSING
AUTHORITY

Defendant.

-----X

INDEX NO. 157266/2012

MOTION DATE 04/25/2020

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for ENFORCEMENT.

In this personal injury action, plaintiff Dmitri Shemkover ("Shemkover" or "plaintiff") moves, *inter alia*, for an order enforcing his alleged settlement agreement with non-party Protective Insurance Company ("PIC"), the workers' compensation insurance carrier for his employer (Doc. 173). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered September 5, 2017 ("the 9/5/17 order"), which denied defendant New York City Housing Authority's ("NYCHA") motion seeking, *inter alia*, to dismiss the complaint pursuant to

CPLR 3211 (c) (Doc. 166). Briefly summarized, this action stems from allegations that, on October 19, 2011, Shemkover, a FedEx employee, was injured while making a delivery to 825 Columbus Avenue, New York, NY, a building owned and operated by NYCHA (Docs. 1, 166). Other relevant facts are set forth below.

On October 9, 2017, following this Court's denial of NYCHA's motion to dismiss, NYCHA filed a Notice of Appeal in the Appellate Division, First Department (Doc. 168). However, plaintiff's counsel represents that this Notice of Appeal was later withdrawn in an effort to settle the action through mediation (Doc. 174 ¶ 7).

As relevant here, since plaintiff was injured during the course of his employment, all medical expenses and lost wages were reimbursed by his employer's workers' compensation insurance carrier, PIC (Doc. 174 ¶ 3). On September 2, 2016, PIC issued a subrogation notice advising plaintiff's counsel that it was asserting a subrogation lien in the amount of \$254,608.52 (Doc. 178). As of November 29, 2017, the subrogation lien totaled \$414,391.29 (Doc. 179). Plaintiff's counsel avers that, during a telephone conversation with PIC's claims examiner, Shawna Barnes ("Barnes"), PIC agreed to accept \$138,130.43 in satisfaction of the lien, corresponding to one-third (1/3) of the \$414,391.29 owed (Doc. 174 ¶ 10). In an email dated January 7, 2018, plaintiff's counsel informed NYCHA and plaintiff of PIC's offer and, thereafter, NYCHA allegedly extended a final settlement offer of \$850,000, subject to resolution of any lawful liens, including the workers' compensation lien (Docs. 174 ¶ 11; 180). When NYCHA's settlement offer was disclosed to PIC, plaintiff's counsel affirms that PIC, albeit through a different claims examiner, disavowed its previous agreement to settle the lien for \$138,130.43 and, instead, insisted that PIC had agreed to settle the lien for one-third of the total lawsuit settlement (Doc. 174 ¶ 12).

On February 10, 2020, plaintiff filed the instant motion seeking to enforce the alleged settlement agreement with PIC for \$138,130.43 (Doc. 173). In the alternative, he requests that this Court direct a hearing on this matter and that PIC be required to produce copies of pertinent tape recordings of telephone conversations between plaintiff's counsel and Barnes (Docs. 173; 174 ¶ 13).

LEGAL CONCLUSIONS:

The motion is denied insofar as any settlement that plaintiff claims to have reached with nonparty PIC was separate from its settlement agreement with NYCHA and, thus, not enforceable in this action (*see generally Paez v Varveris*, 12 Misc 3d 101, 103-104 [2d Dept App Term, 2006]). Moreover, although "[s]tipulations of settlement are judicially favored, they will not lightly be set aside, and 'are to be enforced with rigor and without a searching examination into their substance' as long as they are 'clear, final and the product of mutual accord'" (*Peralta v All Weather Tire Sales & Serv.*, 58 AD3d 822, 822 [2d Dept 2009], *quoting Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]), a settlement agreement will not be enforced when, as here, it fails to comply with the requirements set forth in CPLR 2104 (*see Greenway Mews Realty, LLC v Liberty Ins. Underwriters, Inc.*, 180 AD3d 412, 412 [1st Dept 2020]). Specifically, there is no proof that the alleged oral settlement agreement between plaintiff and PIC was memorialized in writing or "reduced to the form of an order and entered" (CPLR 2104). Thus, plaintiff is not entitled to enforcement of said agreement.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff DMITRI SHEMKOVER's motion is denied in its entirety; and it is further

ORDERED that defendant NEW YORK CITY HOUSING AUTHORITY shall serve a copy of this order, with notice of entry, within 30 days of its entry; and it is further

ORDERED that the parties shall appear for a status conference in this matter on September 8, 2020, at 80 Centre Street, New York, New York, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the Court.

4/30/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE