

Sharapov v Caroline Apts. Preserv., L.P.
2020 NY Slip Op 35389(U)
December 17, 2020
Supreme Court, Kings County
Docket Number: Index No. 518073/2017
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Index Number 518073/2017

SEQ#002

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Part 91

ALISHER SHARAPOV AND NARGIZA KOBILOVA,

Plaintiffs,

against

CAROLINE APARTMENTS PRESERVATION, L.P.,
CAROLINE HOLDGINS, LLC, PREFERRED CONCEPTS,
LLC, THE RELATED COMPANIES, L.P., AND SHERMAN
PARKING INC.,

Defendants.

CAROLINE HOLDINGS, LLC AND PREFERRED CONCEPTS,
LLC,

Third-Party Plaintiffs,

against

LA CASA DEL MOFONGO 207, LLC,

Third-Party Defendants.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	
Order to Show Cause and Affidavits Annexed...	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other	

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Upon review of the foregoing papers, defendant Caroline Holdings, LLC's motion to dismiss is decided as follows:

Plaintiffs commenced this action to recover damages for injuries plaintiff Sharapov claims were caused when he fell from a scaffold while working on a construction project for defendants. Plaintiffs assert claims for negligence and violation of NY Labor Law §§ 200, 240 and 241, as well as a loss of services.

Defendant Caroline Holdings moves to dismiss this action, but does not identify the specific procedural mechanism for dismissal (see CPLR 2214[a] ["A notice of motion shall

specify the . . . the relief demanded and the grounds therefor]). Because defendant argues that this action is barred by plaintiff's execution of a release, it appears that defendant seeks dismissal pursuant to CPLR 3211(a)(5). Pursuant to CPLR 3211(e), a party seeking dismissal pursuant to a release must raise the issue in a pre-answer motion to dismiss or as an affirmative defense in the answer (*Green Tree Servicing, LLC v Weiss*, 180 AD3d 654, 655 [2d Dept 2020]; *U.S. Bank N.A. v Gilchrist*, 172 AD3d 1425, 1427-28 [2d Dept 2019]; *21st Mtge. Corp. v Palazzotto*, 164 AD3d 1293, 1294 [2d Dept 2018]). Because Caroline Holdings did not raise the release in a pre-answer motion to dismiss or as an affirmative defense in the answer, the defense is waived (*id.*).

Even if this court were to consider the matter on its merits, the motion would still be denied. Releases are enforced pursuant to contract law (*Cames v Craig*, 181 AD3d 851, 851 [2d Dept 2020]). The language of the release must be clear and unambiguous in order to enforce it against the party who signed it (*id.*). The party seeking to enforce the release has the initial burden to prove it has been released, and then the burden shifts to the purported releasor to show fraud, duress or some other basis to void the release (*id.* at 852).

Caroline Holdings submits a copy of the subject release. Caroline Holdings previously served a notice to admit the authenticity of the release, to which plaintiffs did not respond, despite a court order to do so. Accordingly, the authenticity of the release is admitted (*32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696, 698 [2d Dept 2015]). This court specifically does not hold that Mr. Sharapov admitted he understood what he was signing when he executed the release. This is a central issue in this action, and therefore not a proper subject of a notice to admit (*id.*).

The release states that Sharapov releases, among others, the "Building Owner" from any

and all claims known or unknown. The “Building Owner” is defined as the “owner of the building at 544-546 [W]est 207th [S]treet, New York, N.Y.” Thus, the release, on its face, does not explicitly include Caroline Holdings. To remedy this deficiency, Caroline Holdings submits the affidavit of Scott Solomon, who states he is the President of Pan Am Equities, Inc., which is the manager of Caroline Holdings. He states that Caroline Holdings is the owner of the building located 544-546 West 207th Street in New York City. He also purports to annex an exhibit that evidences his assertion that Caroline Holdings leases the property to La Casa Del Mofongo 207 LLC, but no such exhibit is attached.

Third-party defendant La Casa Del Mogongo 207, LLC (“La Casa”) submits an affirmation in support of Caroline Holding’s motion and purports to “join” the motion. As La Casa has not separately moved, it is not entitled to any relief. La Casa does not submit any arguments that are different than Caroline Holdings in favor of Caroline Holdings’ motion to dismiss.

In opposition, Mr. Sharapov states in his affidavit that, on December 16, 2016, one of plaintiff’s co-workers came to plaintiff’s building. At the time, Mr. Sharapov was in “severe pain and was taking pain relief medication” (Sharapov Affidavit at ¶8). Mr. Sharapov further states that he understood from his co-worker that the form he was signing was an “acknowledgment form that [he] got [his] paycheck and that [he was] no longer owed two week [sic] worth of salary” (id.).

Like his complaint, Mr. Sharapov’s affidavit “is to be construed in the same favorable light” (*Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018], quoting *Ford v Phillips*, 121 AD3d 1232, 1234 [3d Dept 2014]). When a plaintiff alleges fraud in opposition to a motion

to dismiss based on a release, the motion should be denied (*Sacchetti-Virga*, 158 AD3d at 784, citing cases).

Here Mr. Sharapov states in his affidavit that he was told the release was a document that merely acknowledged he received a paycheck. He alleges fraud with sufficient particularity. To the extent that he does not name the co-worker who allegedly misled him, such a deficiency has been remedied by La Casa's "reply" papers, as explained below. Mr. Sharapov's assertions of fraud weigh in favor of denying Caroline Holding's motion (*id.*; see also *Pacheco v 32-42 55th St. Realty, LLC*, 139 AD3d 833, 834 [2d Dept 2016]).

In its "reply" affirmation¹, La Casa submits an affidavit from Ilhomovich Djumaev Sherzod, who states that he worked with La Casa and that he was the one who provided Mr. Sharapov with the release. He states that he spoke with Mr. Sharapov in Russian and explained to Mr. Sharapov that Mr. Sharapov was signing a release, and that Mr. Sharapov understood what he was signing. Of course, Mr. Sharapov provides an opposing account in his own affidavit, and these competing narratives only confirm that there are issues of fact that cannot be resolved on a motion to dismiss.

Mr. Sharapov further states in his affidavit that he retained counsel two or three weeks after the accident. Through their counsel, plaintiffs submit a copy of a retainer statement, which states that Mr. Sharapov retained counsel on December 3, 2016, and filed the statement with the Office of Court Administration on December 6, 2016. Thus, it is apparent that a representative of La Casa improperly approached Mr. Sharapov while he was represented by counsel.

¹ La Casa did not serve a motion, and so it is not entitled to a "reply". These papers would be better described as an affirmation in further support of the motion by Caroline Holdings.

Based on the foregoing, the motion is procedurally defective, as the defense of release is not properly pled. Furthermore, there are issues of fact about the applicability of the release to these claims, as well as the propriety of the release and the circumstances under which it was signed. Accordingly, defendant's motion to dismiss is denied.

This constitutes the decision and order of the court.

December 17, 2020
DATE


DEVIN P. COHEN
Justice of the Supreme Court

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