Arasim v 38 Co. LLC
2022 NY Slip Op 31623(U)
May 16, 2022
Supreme Court, New York County
Docket Number: Index No. 108427/2010
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET CHAN** **PART** **49M**
Justice

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KEVIN ARASIM, SANDRA ARASIM,

Plaintiff,

- v -

38 COMPANY LLC,CB RICHARD ELLIS REAL ESTATE, LLC,VII 444 MADISON LESSEE LLC,ALL-SAFE, LLC,RESIDENTIAL MANAGEMENT GROUP, LLC D/B/A DOUGLAS ELLIMAN PROPERTY MANAGEMENT, THE LAUREL CONDOMINIUM,

Defendants.

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INDEX NO. 108427/2010

MOTION DATE 03/11/2022

MOTION SEQ. NO. 018

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 018) 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532

were read on this motion to/for RESTORE.

Plaintiffs move pursuant to CPLR 3404 for an order restoring this action to the active trial calendar. Defendants Residential Management Group, LLC d/b/a Douglas Elliman Property Management and the Laurel Condominium (the condominium defendants) cross move for an order pursuant to CPLR 2104 to enforce a settlement agreement, and to compel plaintiffs to provide a stipulation and general release and final lien letters by a date certain.

This consolidated action arises out of two separate incidents in which plaintiff Kevin Arasim was injured. The first occurred on July 13, 2009, when Arasim fell from a scaffolding while working at a construction site. The second occurred on January 28, 2011, when Arasim was struck by snow and ice as he stood on the sidewalk in front of the parking garage of a building owned and operated by the condominium defendants.

The claims against the defendants sued in connection with the construction accident, i.e., 38 Company LLC, CB Richard Ellis Real Estate, LLC and VII Madison Avenue LLC and All Safe, were settled after mediation, and a stipulation dated March 2, 2020 was filed discontinuing these claims (NYSCEF # 515). Although the claims against the condominium defendants relating to the second incident were not resolved then, the entire action was erroneously marked disposed.

In the meantime, mediation continued with regard to plaintiffs' claims against the condominium defendants and, on July 23, 2021 and July 26, 2021, the attorneys for the parties and the mediator exchanged emails indicating that plaintiffs' claims against the condominium defendants had been settled for $2.85 million (NYSCEF #'s 524-527). Subsequently in August and September 2021, the attorneys for the parties exchanged emails regarding the details of the settlement, including lien letters and drafts of a general release (NYSCEF #'s 528-530). However, the settlement was not effectuated by the plaintiffs, and a release has not been signed.

In his affirmation in response to the cross motion, counsel for plaintiffs states that on June 7, 2021, Arasim "unequivocally...gave me the authority to accept the [$2.85 million] offer" (NYSCEF #9, ¶ 6). But, "[s]ubsequently Mr. and Ms. Arasim accused me of settling the matter without Mr. Arasim's authority, acting unethically and engaging in other behavior contrary to their best interests, even threatening to file grievances and a malpractice suit" (*id.*, ¶ 10). He further states that "on January 3, 2022, at a follow-up meeting between myself and Mr. Arasim ... Mr. Arasim admitted that he did give me authority to settle the matter and that the refusal to effectuate the settlement was due to a marital dispute between him and his wife relative to the distribution of the settlement funds" (*id.*, ¶ 10).

While this motion was pending, the court received a letter from Arasim dated March 28, 2022 via priority mail.[1] In the letter, Arasim denies that he agreed to settle the claims against the condominium defendants, or that he gave his attorney authority to settle the claims, and seeks to revoke his attorney's authority. Attached to the March 28th letter are five letters from Arasim to his attorney dated between November 9, 2022 and March 8, 2022 which, *inter alia,* deny that plaintiffs accepted the condominium defendants' settlement offer, and a letter to the court dated March 8, 2022, which states, *inter alia*, that Arasim informed his attorney in October 2021 that he was not accepting the settlement offer.

Regarding plaintiffs' motion to restore the action to the calendar, this motion is granted as it is undisputed that the claims against the condominium defendants were still pending when the entire action was marked disposed.

As for the cross motion to mark the action settled, the court notes that "[t]o be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104[2] [which as relevant here provides]... that such an agreement be "in

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[1] The letter does not indicate that it was copied to plaintiffs' attorney.

[2] CPLR 2104 provides that:

> 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

writing and signed by the parties (or attorneys of the parties) to be bound by it" (*Headley v City of New York*, 115 AD3d 804, 807 [2d Dept 2014]). Emails exchanged between attorneys which identify the attorneys' email account have been held to constitute signed writings within the meaning of CPLR 2104 (*Philadelphia Ins. Indem. Co. v Kendall,* 197 AD3d 75, 80 [1st Dept 2021] [holding that "if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own," the parties' counsel's emails create a binding settlement agreement]; *see also, Jimenez v Yanne*, 152 AD3d 434, 434 [1st Dept 2015] [finding that email communications between the parties' attorneys were "sufficiently set forth an enforceable agreement to settle plaintiffs' personal injury claims"]). To be enforceable "an email settlement must, like all enforceable settlements, set forth all material terms" (*Philadelphia Ins. Indem. Co.,* 197 AD3 at 80; *see also Forcelli v Gelco Corp.*, 109 AD3d 244, 251 [2d Dept 2013] [to satisfy the requirements of CPLR 2104, the email exchange must "contain all material terms of a settlement and a manifestation of mutual accord...under circumstances manifesting an intent to be bound]). At the same time, however, when the only material term is the sum of money to be agreed upon, issues regarding the language of a release or lien payments need not be addressed in the emails for a settlement to be enforceable (*Philadelphia Ins. Indem. Co.,* 197 AD3 at 81; *Rawald v Dormitory Authority of New York*, 199 AD3d 477, 477 [1st Dept 2021] [plaintiffs established enforceable settlement by submitting emails from counsel agreeing to accept settlement notwithstanding outstanding issues regarding language of release and lien issues]).

Here, the court finds that the emails between attorneys evidence a mutual intent to be bound to an agreement to settle plaintiffs' claims against the condominium defendants for $2.85 million. Specifically, the email from plaintiffs' counsel from his email account to defense counsel on July 23, 2021, states "I am just confirming that this matter settled for $2.85 million. I am in the process of getting the [Workers Compensation] consent and we have a [M]edicare lien of about $1,500. I can send a printout. In the interim please forward a release" (NYSCEF #524). On July 26, 2021, defense counsel responded by sending an email from his email account thanking plaintiff's counsel for his email and writing that "we will take care of the general release. Please forward the Medicare printout and a copy of the consent letter from the [Workers Compensation] insurer" (NYSCEF # 525). Also, on July 26, 2022, defense counsel wrote an email to the mediator notifying her that the matter had settled for $2.85 million (NYSCEF # 526).

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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.

Moreover, even putting aside that the statements in Arasim's letter submission are unsworn, the submission is insufficient to show that the parties did not enter into a binding settlement agreement. Specifically, plaintiffs' assertions that they did not agree to the settlement amount or give their attorney authority to settle for this amount do not provide grounds for refusing to enforce the settlement agreement. In reaching this conclusion, the court notes that since plaintiffs' attorney appeared for plaintiffs in this action and represented their interests at the mediation, the attorney had apparent authority to settle the action on behalf of plaintiffs (*Hallock v State of New York*, 64 NY2d 224, 231-232 [1984] [enforcing settlement based on attorney's apparent authority to act on plaintiffs' behalf even if, as plaintiffs asserted, they instructed attorney to reject the settlement offer]; see also *Davidson v. Metropolitan Trans. Auth.,* 44 AD3d 819, 819 [2d Dept 2007] [attorney had apparent authority "as a matter of law" where he "had a lengthy involvement in the case, engaging in settlement negotiations and appearing at pretrial conferences"]). Finally, in light of the plaintiffs' attorney's apparent authority to act on their behalf, plaintiffs' refusal to execute a release is insufficient to invalidate a settlement agreement (*Williamson v Delsener,* 59 AD3d 291, 292 [1st Dept 2009]).

Accordingly, it is

ORDERED that plaintiffs' motion to restore this action to the trial calendar is granted and this action shall be restored to the trial calendar upon entry of this order; and it is further

ORDERED that defendants' cross motion to enforce the settlement agreement is granted; and it is further

ORDERED that unless within 45 days of entry of this Decision and Order, plaintiffs provide a general release and stipulation of discontinuance, and final lien letters so that they can obtain the settlement moneys, defendants shall provide the settlement moneys to plaintiffs' counsel who shall forthwith deposit the money in a separate interest-bearing escrow account and provide proof of the deposit of the settlement funds to plaintiffs.

5/16/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER