

Hirsch v Calagna

2022 NY Slip Op 32874(U)

August 24, 2022

Supreme Court, New York County

Docket Number: Index No. 805211/2013

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 805211/2013

ADRIANA MORENO HIRSCH,

Plaintiff,

MOTION SEQ. NO. 008

- v -

LAWRENCE CALAGNA, BURTON LANGER, DENTAL CARE OF SCARSDALE, PLLC, BURTON LANGER, D.M.D., P.C., BURTON LANGER, D.M.D. AND LAUREEN LANGER, D.D.S., P.C.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304

were read on this motion to/for ENFORCEMENT OF SETTLEMENT.

In this dental malpractice action, defendants Burton Langer, D.M.D. (“Dr. Langer”), Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C. (collectively “the Langer defendants”) move, pursuant to CPLR 2104, to enforce the settlement they reached with plaintiff Adriana Moreno Hirsch. Plaintiff opposes the motion in part. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from allegedly negligent dental treatment rendered to plaintiff by defendants Dr. Langer and defendant Lawrence Calagna, D.D.S. between August 2010 and August

2012.¹ Plaintiff commenced the captioned action by filing a summons and complaint against Dr. Langer, Dr. Calagna, Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C., and Dental Care of Scarsdale, PLLC² in June 2013. In her complaint, plaintiff alleged dental malpractice and lack of informed consent.

A pre-trial conference was held in this matter before Hon. Deborah Kaplan on July 14, 2021. At that conference, the parties were advised that the trial of this action would commence in January 2022. On July 16, 2021, the parties were directed to participate in a court-supervised mediation. On October 13, 2021, the parties were advised that the trial would begin on January 24, 2022, and that no further adjournments would be permitted.

On October 22, 2021, the parties appeared for a pre-trial conference before the undersigned. At the conference, the parties represented that they were ready to proceed to trial on January 24, 2021. Following an unsuccessful court-ordered mediation, the parties continued settlement negotiations before the undersigned.

By email correspondence dated December 10, 2021, counsel for the Langer defendants requested that a settlement conference before the undersigned scheduled for December 10, 2021 be adjourned since plaintiff had agreed to accept a \$150,000 settlement offer tendered by CNA Insurance Company. Doc. 295. Counsel for the Langer defendants stated that the settlement was “subject to the plaintiff executing a [g]eneral [r]elease, [s]tipulation of [d]iscontinuance, and a [h]old [h]armless [a]greement approved by CNA Insurance Company.”

On December 15, 2021, the parties appeared in open court and the terms of a settlement between plaintiff and the Langer defendants were formally placed on the record. Doc. 288.

¹ The facts set forth herein are adopted from the moving papers of the Langer defendants since they are essentially undisputed. Although plaintiff’s counsel concedes in his affirmation in partial opposition that the facts set forth by the Langer defendants are “largely accurate”, he fails to specify any particular inaccuracy.

² The claims against Dental Care of Scarsdale, PLLC were discontinued in May 2017.

Plaintiff was allocated with respect to the settlement, and the terms of the settlement were approved by the undersigned. Doc. 288. Among other things, the plaintiff acknowledged on the record that:

She was entering into the settlement of her own free will and was not under the influence of any substance which would impair her judgment or understanding of the settlement;

She understood that she was settling her claim against Dr. Langer for \$150,000;

Although no formal settlement agreement had been signed, her agreement to settle on the record had the same force and effect as such an agreement; and

She understood that Dr. Langer's attorney was going to prepare settlement papers including a general release and a provision pursuant to which plaintiff would hold Dr. Langer harmless for any liens.

Doc. 288.

After the settlement was placed on the record, the parties exchanged emails in which they discussed possible terms of the settlement agreement. Doc. 297. For example, counsel for the Langer defendants requested that plaintiff execute a release/settlement agreement releasing her claims against Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C., since the claims against that entity were never discontinued. Doc. 297. Additionally, plaintiff objected to a confidentiality provision requested by counsel for the Langer defendants because she believed she might need to sue other entities as a result of her injuries. Doc. 297. Counsel for the Langer defendants accommodated plaintiff by adding a provision to the release agreeing that plaintiff could disclose terms of the agreement "as may be needed to prosecute other legal actions." Docs. 297, 298. By email correspondence to counsel for the Langer's defendants dated December 27, 2021, plaintiff's counsel asked counsel for the Langer defendants to incorporate those terms into the settlement agreement and represented that he would do his best to get plaintiff to sign the agreement. Doc. 297. Plaintiff's attorney did not object to the request by counsel for the Langer defendants for the confidentiality language to be incorporated into the agreement. Doc. 297. Nevertheless, plaintiff

refused to execute the proposed release and settlement agreement sent to her by counsel for the Langer defendants containing this language. Doc. 298. Nor has she executed stipulation of discontinuance provided by counsel for the Langer defendants.

On the eve of trial, plaintiff advised the undersigned that she could not proceed with the trial against the remaining defendant due to a medical condition. By order dated January 21, 2022, the undersigned marked the action off of the trial calendar and warned that, if the case was not restored within one year, it would be dismissed. Doc. 299.

On February 8, 2022, counsel for the Langer defendants wrote to plaintiff's counsel to advise that, if plaintiff did not accept the settlement by February 15, 2022, the Langer defendants would deem the settlement abandoned and move to dismiss the complaint. Doc. 300.

Since plaintiff failed to execute the release, counsel for the Langer defendants proceeded to file the instant motion on March 23, 2022. Docs. 286-301. In support of the motion, the Langer defendants argue that the settlement is binding since plaintiff agreed to the terms of the same on the record in open court.

As noted previously, plaintiff's counsel does not dispute the facts set forth by counsel for the Langer defendants. Indeed, plaintiff's own attorney admits that plaintiff has "given [him] no good faith basis to argue against enforcement of the stipulated settlement" despite refusing to sign the releases with the additional language not contained in the stipulation on the record. Plaintiff's attorney further concedes that "[p]laintiff has objected to signing [the settlement] documents for a number of reasons, most of which pertain to provisions in said documents that bear no relation to the settlement as stipulated in court", such as the non-disclosure agreement proposed by the Langer defendants. Doc. 302.

Thus, argues plaintiff's counsel, this Court should issue an order releasing the Langer defendants, their attorney, and their insurance company from any claims arising from their alleged malpractice, releasing them from any liens which might arise on the recovery; and directing the payment of \$150,000 to Pena & Kahn, as attorneys for plaintiff, within 30 days.

In reply, the Langer defendants argue that plaintiff's counsel improperly seeks to have the settlement paid to plaintiff while allowing the latter to escape her responsibilities under the settlement. Doc. 303.

LEGAL CONCLUSIONS

"Stipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of 'open court' stipulations within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984] [internal citations omitted])..."The fact that it is necessary for the parties to exchange general releases and execute a confidentiality agreement [after a settlement is placed on the record in open court] does not render the agreement invalid" (*Shah v Wilco Sys., Inc.*, 81 AD3d 454, 455 [1st Dept 2011], *lv dismissed* 17 NY3d 901 [2011]), nor does the parties' representation that they would "execute formal settlement papers" demonstrate that there was no agreement on material terms (*Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617, 618 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]; *accord Reyes v Sequeira*, 68 AD3d 526, 527 [1st Dept 2009]; *see also Thomas v Slaton*, 200 AD3d 546 [1st Dept 2021]).

(*Nieborak v W54-7 LLC*, 203 AD3d 439, 439-440 [1st Dept 2022]).

Here, the material terms of the settlement were placed on the record before the undersigned on December 15, 2021. During the course of the allocution of plaintiff, she acknowledged that, although no formal settlement agreement had been signed, her agreement to settle in open court had the same force and effect. Plaintiff was also advised that counsel for the Langer defendants was going to prepare settlement papers, including a general release and a provision pursuant to which plaintiff would hold the Langer defendants harmless for any liens. When plaintiff subsequently objected to the inclusion of a confidentiality provision in the settlement agreement

because she thought it could impede any future lawsuits arising from her treatment, counsel for the Langer defendants changed the language of the proposed settlement agreement to ensure that plaintiff would be permitted to disclose information regarding the settlement in the event she needed to do so in order to pursue a future claim arising from her injuries. When counsel for the Langer defendants changed this language to accommodate plaintiff, counsel for plaintiff did not object to the provision but rather said he would do his best to have plaintiff sign the agreement with that language incorporated therein.

"The party seeking to vacate or set aside a stipulation of settlement has the burden of establishing good cause sufficient to invalidate a contract, such as that the stipulation was the result of duress, fraud, or overreaching, or that the terms of the stipulation were unconscionable, in order to be relieved from the consequences of the stipulation" (*Amerally v Liberty King Produce*, 170 AD3d 637, 638 [2d Dept 2019] [citation omitted]). Here, plaintiff fails to establish that the terms of the settlement agreement were either egregiously unfair or one-sided or resulted from a mistake made despite the exercise of ordinary care (*See Amerally*, 170 AD3d at 638). Therefore, this Court directs that the settlement reached in open court be enforced.

Accordingly, it is hereby:

ORDERED that the motion by defendants Burton Langer, D.M.D., Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C. to enforce the settlement entered on the record before the undersigned on December 15, 2021 pursuant to CPLR 2104 is granted; and it is further

ORDERED that, within 10 days after the entry of this order, defendants Burton Langer, D.M.D., Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C. shall serve this order with notice of entry on all parties; and it is further

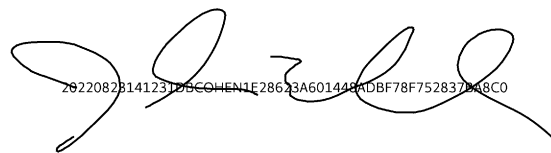
ORDERED that within 14 days after service of this order with notice of entry, plaintiff shall execute the Settlement Agreement and Release of All Claims filed by counsel for the said defendants on NYSCEF as Doc. 298 or it shall be deemed signed by plaintiff; and it is further

ORDERED that within 14 days after service of this order with notice of entry, counsel for plaintiff and defendants Burton Langer, D.M.D., Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C. shall execute the Partial Stipulation of Discontinuance also filed by counsel for the said defendants on NYSCEF as Doc. 298 or it will be deemed signed by plaintiff; and it is further

ORDERED that defendants Burton Langer, D.M.D., Burton Langer, D.M.D., P.C., and Burton Langer, D.M.D. and Lauren Langer, D.D.S., P.C., or their insurer, shall pay the amount due to plaintiff as reflected in the Settlement Agreement and Release of All Claims within 21 days after service of this order with notice of entry; and it is further

ORDERED that if payment of the settlement is not made as directed herein, judgment may be entered against any non-paying defendant, jointly and severally as to the amount agreed, and such judgment is to include statutory interest from December 15, 2021 plus costs and disbursements, and the Clerk is directed to enter judgment therefor upon proper presentation of papers.

8/24/2022
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE