Goldfein v Divino
2022 NY Slip Op 34371(U)
December 15, 2022
Supreme Court, New York County
Docket Number: Index No. 805449/2016
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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CAROL GOLDFEIN,

Plaintiff,

- v -

CELIA DIVINO, M.D., DAVID BERMAN, M.D., PETER GLICKMAN, M.D., LOUIS NEISTADT, M.D., THE MOUNT SINAI HOSPITAL, PARK AVENUE MEDICAL PROFESSIONALS, P.C., and LENOX HILL RADIOLOGY,

Defendants.

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INDEX NO. 805449/2016

MOTION DATE 10/03/2022

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action to recover damages for medical malpractice, the plaintiff moves, on the ground of mutual mistake, for the rescission of a signed stipulation of settlement that she entered into with the defendants Louis Neistadt, M.D., Peter Glickman, M.D., and Lenox Hill Radiology (collectively the Lenox Hill defendants). The Lenox Hill defendants oppose the motion. The motion is denied.

The plaintiff commenced this action on November 17, 2016. The Lenox Hill defendants, although all represented by the same attorney, each separately answered the complaint between December 2016 and February 2017. The Lenox Hill defendants were all insured under a policy of medical malpractice insurance issued by Fairway Physicians Insurance Company, A Risk Retention Group (Fairway), an entity incorporated in the District of Columbia. On August 29, 2017, the District of Columbia Department of Insurance, Securities and Banking (DC DISB) found that Fairway was insolvent. By order dated October 25, 2017, the District of Columbia

Superior Court granted the DC DISB's petition to place Fairway in liquidation, and appointed the DC DISB as liquidator. The liquidation order stayed the prosecution of all actions against Fairway's insured. By order dated September 6, 2019, however, the District of Columbia Superior Court vacated the stay, thus authorizing allegedly injured persons having claims against Fairway's policyholders to proceed with actions pending outside of the District of Columbia Superior Court, as the DC DISB elected to forego defending any such actions that were pending in courts outside of the District of Columbia. Rather, the DC DISB relied upon private attorneys in those actions to defend Fairway's policyholders.

According to the plaintiff's attorney, during 2020 and 2021, he discussed settling the action with the Lenox Hill defendants, with the understanding that Fairway was the subject of that liquidation proceeding in the District of Columbia. As he described it,

> "[a]n agreement was made between the Plaintiff and the three named Defendants to settle the case in the amount of $400,000.00 on the understanding that when the liquidation proceeds would be distributed Ms. Goldfein would get approximately 50%."

The plaintiff and the Lenox Hill defendants entered into a written settlement agreement dated April 6, 2022, at which point the plaintiff discontinued the action against the remaining defendants. As relevant here, the agreement provided that Niestadt would execute an affidavit of confession of judgment on behalf of all of the Lenox Hill defendants, although the agreement did not specify the amount to be confessed. In fact, Niestadt executed and filed an affidavit of confession of judgment, sworn to April 27, 2022, in the principal sum of $400,000.00. In his affidavit, Niestadt asserted that

> "the Plaintiff acknowledges that payment of the Settlement Sum will flow through the Fairway Liquidation Estate, being overseen by the individual appointed by the District of Columbia Department of Insurance, Securities and Banking Commissioner as Fairway's liquidator . . . pursuant to the insolvency proceedings commenced under the following action, *District of Columbia Department of Insurance, Securities and Banking v Fairwav Physicians Insurance Company, A Risk Retention Group* and known as Case Number 2017 CA 6962."

In the agreement itself, the plaintiff consented that, upon Niestadt's filing of the affidavit, she would discontinue the action against the Lenox Hill defendants, and she agreed not to commence any further actions against them arising from their alleged malpractice. In addition, Section 3 of the agreement provided, in relevant part, that

> "3.3 [t]he Parties agree that Plaintiff, or any representative, successor or assign of Plaintiff, will seek to collect the Judgments *solely from the Liquidation Estate*.
>
> "3.4 *Regardless of the amount* that Plaintiff, or any representative, successor or assign of Plaintiff, collects from the Liquidation Estate on the Judgments, or otherwise in the event that the DC court does not give effect to the Judgments, Plaintiff and any representative, successor or assign of *Plaintiff shall remain bound by the terms of this Agreement, including the Covenant Not To Sue/ Execute contained in this Article.*"

(emphasis added). Crucially, as relevant to the instant motion, Section 9 of the agreement provided as follows;

> "9.1 Plaintiff acknowledges that neither Defendants, nor any of Defendants' representatives, have made any oral representations to Plaintiff or any of Plaintiff's representatives.
>
> "9.2 Plaintiff disclaims reliance on any representations other than those expressly set forth in this Settlement Agreement.
>
> "9.3 Plaintiff acknowledges that neither Defendants, nor any of Defendants' representatives, have made any representations to Plaintiff relative to: (i) the amount of the pro rata distribution to be made to creditors of the Liquidation Estate, (ii) the amount that Plaintiff, or any representative, successor or assign of Plaintiff, will ultimately collect from the Liquidation Estate on the Judgments, and (iii) the existence of any source of recovery other than the Liquidation Estate."

The plaintiff executed the agreement on April 6, 2022, Niestadt executed it on April 27, 2022, Glickman executed it on May 4, 2022, and Lenox Hill Radiology executed in on May 2, 2022.

The plaintiff asserted that all of the settlement papers were sent to Fairway to begin the process of approving the settlement amount and distributing the settlement proceeds, after which, on July 22, 2022, her attorney contacted "contacted Fairway Physician's Insurance and spoke with their adjuster Patrick Broyles." According to her attorney, the "adjuster" informed counsel that the plaintiff "should expect to walk away with less than 25% of the 400K settlement" that counsel had agreed to with the Lenox Hill defendants' attorneys, or "less than half of what

the parties had intended and expected." In other words, according to counsel, Fairway's adjuster told him that the plaintiff should only expect a distribution of $100,000 or less, rather than the $200,000 that the Lenox Hill defendants' attorneys had suggested would be the likely distribution. The plaintiff's attorney does not identify Broyles as a representative of the DC DISB. Nor is it clear whether the plaintiff's attorney ever spoke or negotiated with any representative of the DC DISB, as liquidator, to finalize the amount of the distribution. In this regard, the court notes that, although the DC DISB obtained a judicial dissolution of the stay of litigation against Fairway's insureds in courts outside of the District of Columbia, it had not waived its statutory obligation as the final arbiter of settlements involving those insureds.

The plaintiff now contends that the settlement agreement should be rescinded because it was secured on the basis of a mutual mistake. She argues that it was the intent of the parties that, notwithstanding Niestadt's confession of judgment in the sum of $400,000, and the absence of any mention in the settlement agreement of the amount of the settlement, she would be receiving a distribution of $200,000 from the DC DISB, and not $100,000 or less. The court rejects the plaintiff's argument.

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see Matter of Galasso v Galasso*, 35 NY2d 319, 321 [1974]; *Gyabaah v Rivlab Transp. Corp*., 102 AD3d 451, 454 [1st Dept 2013]). A stipulation of settlement is a contract that is subject to rules applicable to all contracts (s*ee Brad H. v City of New York*, 17 NY3d 180, 185 [2011]). Contracts are subject to the equitable remedy of rescission if entered into under a mutual mistake (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High Sch. Dist*., 81 NY2d 446, 453 [1993]). To invoke the doctrine of mutual mistake, a party must present proof that the agreement, as expressed, does not represent a "meeting of the minds" between the parties in some material respect (*see Zacharius v Kensington Publ. Corp*., 167 AD3d 452, 454 [1st Dept 2018]; *Jerome M. Eisenberg, Inc. v Hall*, 147 AD3d 602, 604 [1st Dept 2017]; *Resort Sports Network Inc. v PH Ventures III, LLC*, 67

AD3d 132, 135 [1st Dept 2009]). The mutual mistake must exist at the time the contract is entered into (*Matter of New York Agency & other Assets of Bank of Credit & Commerce Intl. [Superintendent of Banks of State of N.Y.--CITIC Indus. Bank],* 90 NY2d 410, 424 [1997]) and it must be substantial (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High Sch. Dist*., 81 NY2d at 453; *Jerome M. Eisenberg, Inc. v Hall*, 147 AD3d at 604). To establish mutual mistake, the moving party must overcome a heavy presumption, and prove, by clear and convincing evidence, that the agreement did not express the intentions of either party (*see Gunther v Vilceus*, 142 AD3d 639, 641 [2d Dept 2016]; *US Bank Natl. Assn. v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012]; *Migliore v Manzo*, 28 AD3d 620, 621 [2d Dept 2006]).

Generally, where a contract is unambiguous, parol evidence of any alleged verbal agreements to explain or alter the terms of the contract is precluded (*see Centaur Props., LLC v Farahdian*, 29 AD3d 468, 469 [1st Dept 2006]). Indeed, "[a]bsent fraud or mutual mistake, the parol evidence rule precludes a party from offering evidence to contradict or modify an unambiguous contract" (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 340 [1st Dept 2007]). Even where mutual mistake is alleged, however, the

> "Court of Appeals has strongly cautioned . . .that allowing parol and oral evidence 'obviously recreates the very danger against which the parol evidence rule and Statute of Frauds were supposed to protect--the danger that a party, having agreed to a written contract that turns out to be disadvantageous, will falsely claim the existence of a different, oral contract'"

(*Resort Sports Network Inc. v PH Ventures III, LLC*, 67 AD3d at 135, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

The settlement agreement in the instant matter unambiguously provided that the plaintiff would accept whatever amount the DC DISB, as liquidator, was willing to distribute in connection with the settlement, and that "[r]egardless of the amount that Plaintiff . . . collects from the Liquidation Estate," the plaintiff would "remain bound" by the other terms of the settlement agreement, and forego any further proceedings to collect the confessed judgment amount from the Lenox Hill defendants. It further provided that the plaintiff would "seek to

collect the [confessed] Judgments *solely from the Liquidation Estate*" (emphasis added). The plaintiff fully understood that the Lenox Hill defendants would refuse to recognize an exception to these provisions if the DC DISB only agreed to distribute $100,000 to her, rather than $200,000 or $400,000, from the liquidation estate. The parties fully understood that the Lenox Hill defendants' representations could not bind the liquidator, and clearly understood that the plaintiff agreed to accept the maximum amount that she could obtain from the DC DISB, no matter what that amount might be. This conclusion is supported by the fact that no absolute amount or percentage of the confessed $400,000 judgment is referenced in the settlement agreement as a measure of what must be paid to the plaintiff. Hence, she has not established by clear and convincing evidence that the agreement must be rescinded due to mutual mistake.

Moreover, the terms of the settlement agreement expressly precluded the plaintiff from relying on anything that the Lenox Hill defendants allegedly had represented to her with respect to the amount that she would "will ultimately collect from the Liquidation Estate," and the "pro rata distribution to be made to creditors of the Liquidation Estate." Additionally, the plaintiff had expressly disclaimed her reliance on any representations other than those set forth in the agreement. Thus, she cannot now be heard to complain that she in fact relied on these very types of parol representations, and that her reliance in this regard warrants the rescission of the agreement due to mutual mistake (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42 [1st Dept 2012]). "'Since the written instrument contains terms different from those allegedly orally represented, and [plaintiff] is presumed to have read the writing, [s]he may not claim [s]he relied on the representations'" (*Corporate Graphics, Inc. v Mehlman Management Corp.*, 81 AD2d 767, 767 [1st Dept 1981]; *Humble Oil & Refining Co. v Jaybert Esso Serv. Sta.,* 30 AD2d 952, 952 [1st Dept 1968]).

Thus, although it may appear unfair that the plaintiff might not ultimately collect the amount that she hoped to collect when she entered into the settlement agreement, in light of the clear and longstanding rules concerning the law of contracts and contract interpretation, the

court is constrained to deny her motion. Moreover, if the court sets aside the agreement now, the DC DISB ultimately may approve the distribution of an amount far less than she would collect at this juncture.

The court notes that, inasmuch as the plaintiff has discontinued the action against all of the codefendants of the Lenox Hill defendants, and the subject settlement agreement with the Lenox Hill defendants resolves the action against them, the matter must be marked disposed.

In light of the foregoing, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

12/15/2022
DATE

JOHN J. KELLEY, 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