

Hernandez v Tanouye

2023 NY Slip Op 31037(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 805377/2014

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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JULISSA HERNANDEZ,

Plaintiff,

- v -

ROBERT TANOUYE, M.D., THEODORE BANIA, M.D.,
SHONDA CORBETT, M.D., NEW YORK PRESBYTERIAN
HOSPITAL, and ROOSEVELT HOSPITAL,

Defendants.

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INDEX NO. 805377/2014

MOTION DATE 01/06/2023

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164

were read on this motion to/for ENTER JUDGMENT/PROMPT PAYMENT/ CPLR 5003-a.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 5003-a for leave to enter judgment against the defendants Theodore Bania, M.D., Shonda Corbett, M.D., and Roosevelt Hospital (collectively the Roosevelt defendants), jointly and severally, in the principal sum of \$20,000, plus costs and lawful disbursements, along with statutory interest from July 5, 2022. The plaintiff alleges that the Roosevelt defendants failed to make a prompt payment of the settlement proceeds after she tendered a general release and stipulation of settlement. The Roosevelt defendants oppose the motion. The motion is denied.

On June 27, 2022, the plaintiff and the Roosevelt defendants settled the action between them for the principal sum of \$20,000. On July 5, 2022, counsel for the Roosevelt defendants acknowledged receipt, from the plaintiff's attorney, of an executed general release and executed proposed stipulation of discontinuance. In a series of emails between those attorneys over the next several months, counsel for the Roosevelt defendants asked the plaintiff's attorney to waive the prompt payment provisions of CPLR 5003-a, but he never did so. Moreover, although counsel for the Roosevelt defendants repeatedly asserted that she could not tender a

settlement check until she received a Medicaid lien letter from the New York City Department of Social Services, the plaintiff's attorney never expressly agreed to condition payment of the settlement upon his provisions of a such a letter to counsel for the Roosevelt defendants. This motion ensued.

"The purpose of CPLR 5003-a, enacted in 1992, is to encourage the prompt payment of damages in settled actions (*see Kumar v Demasi*, 170 AD3d 986, 988; *Azbel v County of Nassau*, 149 AD3d 1020, 1021; *Davila v Cornelia 1731 Corp.*, 139 AD3d 999, 999; *Pitt v New York City Hous. Auth.*, 106 AD3d 797, 797-798). To this end, the statute requires any settling defendant, subject to certain exceptions not applicable here (*see CPLR 5003-a[b], [c], [d]*), to pay all sums due to any settling plaintiff 'within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing [the] action executed on behalf of the settling plaintiff' (*id.* § 5003-a[a]). Where a release and stipulation of discontinuance are tendered by mail, the 21-day period is measured from receipt of those documents (*see Klee v Americas Best Bottling Co., Inc.*, 76 AD3d 544, 544-545; *Cunha v Shapiro*, 42 AD3d 95, 101). If the settling defendant fails to pay all sums due to the settling plaintiff within 21 days after the tender of the required documents, the statute authorizes the plaintiff to enter, without further notice, a 'judgment . . . for the amount set forth in the release, together with costs and lawful disbursements, and interest' (CPLR 5003-a[e])."

(*Levine v American Multi-Cinema, Inc.*, 208 AD3d 1230, 1232-1233 [2d Dept 2022]).

Here, although the plaintiff fulfilled the express obligations mandated by CPLR 5003-a by tendering a duly executed general release and stipulation of discontinuance to the Roosevelt defendants' counsel, the Appellate Division, First Department, has held that federal law obligates a settling defendant to refrain from disbursing settlement proceeds until it receives proof of the nature and extent of all liens on the recovery that are held by agencies that provided federal medical benefits to the plaintiff (*see Torres v Visto Realty Corp.*, 127 AD3d 545, 545 [1st Dept 2015] [obligation to report Medicare lien pursuant to 42 USC § 1395y(b)(8) and 42 CFR 411.24(b)]) or until it receives verification of payee's name, address, and taxpayer identification number on an IRS form W-9 (*see Cely v O'Brien & Kreitzberg*, 45 AD3d 368, 369 [1st Dept 2007] [obligation of settling defendant, pursuant 26 USC § 3406(a)(1)(A), to deduct and withhold tax if payee fails to furnish that information]).

The court recognizes that, in *Levine* and prior decisions, the Appellate Division, Second Department, rejected the First Department's approach, concluding that "[n]either CPLR 5003-a, nor the parties' [general release and stipulation of discontinuance], imposed any additional requirement on the plaintiff or [her] attorney" (*Levine v American Multi-Cinema, Inc.*, 208 AD3d at 1233, quoting *Klee v Americas Best Bottling Co., Inc.*, 76 AD3d 544, 546 [2d Dept 2010]). In *Levine*, the Second Department reversed an order that vacated a judgment entered pursuant CPLR 5003-a, reinstated the judgment notwithstanding the fact that the plaintiff failed to provide the defendants with a Medicare lien letter, and concluded that the plaintiff need not accept only the principal amount of the settlement that ultimately was tendered by defendants. In *Klee*, that same Court concluded that CPLR 5003-a does not impose an obligation upon a plaintiff to provide a defendant with a W-9 form certifying his tax identification number as a condition precedent to tender of settlement proceeds, inasmuch as personal injury settlement proceeds were not part of "gross income" within the meaning of the Internal Revenue Code and, hence neither taxable nor subject to reporting. In *Tencza v St. Elizabeth Med. Ctr.* (87 AD3d 1375, 1376 [4th Dept 2011]), the Fourth Department joined the Second Department in holding that a defendant cannot make the tender of a Medicare lien letter a condition precedent to the disbursement of the proceeds (*cf. Kumar v Demasi*, 170 AD3d 986, 989-990 [2d Dept 2019] [suggesting that a plaintiff may stipulate to providing private lien information as a condition precedent to disbursement of proceeds, or may also discharge the settling defendant's obligation to pay the lien by assuming that obligation himself]; *Liss v Brigham Park Coop. Apts. Sec. No. 3, Inc.*, 264 AD2d 717, 718 [2d Dept 1999] [release sent by the plaintiff to defendants was defective, as it did not provide for release of the plaintiff's Medicare lien; since federal government has right of subrogation and may collect the amount of the lien directly from the defendant, it was incumbent upon the plaintiff to provide for the release of the lien]).

Since this court is bound to adhere to the precedent established in the First Department (see *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), it is constrained to conclude that,

unless and until the plaintiff provides the Roosevelt defendants with the necessary lien letter, those defendants need not tender the settlement proceeds to the plaintiff.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

3/30/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: