

Pinder v Mount Sinai Hosp.

2023 NY Slip Op 34315(U)

December 11, 2023

Supreme Court, New York County

Docket Number: Index No. 158761/2019

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M

Justice

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JEAN PINDER, as Administrator of the Estate of
PATRICIA PINDER, Deceased, and JEAN PINDER
Individually,

Plaintiff,

- v -

THE MOUNT SINAI HOSPITAL, THE NEW JEWISH HOME,
and ARCHCARE at TERENCE CARDINAL COOKE
HEALTH CARE CENTER,

Defendants.

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INDEX NO. 158761/2019

MOTION DATE 08/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

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

In this action to recover damages for medical malpractice and wrongful death, the defendant The Mount Sinai Hospital (Mount Sinai) moves to enforce a settlement agreement that, upon the conclusion of a formal mediation proceeding, it had entered into with the plaintiff. The defendant The New Jewish Home (NJH), in papers erroneously denominated as a notice of cross motion, but which in actuality constituted a separate motion, moves for the same relief as to it. The plaintiff’s attorney submits a response to the motion, in which he asserts that, after researching the issue, he could discern “no valid basis to set aside the parties’ settlement agreement.” The motion and separate motion are granted, and the plaintiff is directed to execute and provide all of the defendants with the documents necessary to effectuate the settlement pursuant to the terms described herein.

The plaintiff alleged in her bills of particulars, among other things, that her mother (hereinafter the decedent) was a resident of the NJH between June 2017 and July 2017, and that NJH committed malpractice in exposing the decedent to a tuberculosis infection and in

failing timely to recognize the signs and symptoms thereof, thus delaying examination, testing, and diagnosis of the condition. She further alleged that, between July 2017 and August 2017, her decedent was a resident of the defendant Archcare at Terence Cardinal Cooke Health Care Center (Archcare), and that Archcare committed malpractice by further exposing her decedent to a tuberculosis infection and in failing timely to recognize the signs and symptoms thereof, thus delaying examination, testing, and diagnosis of the condition. In addition, the plaintiff alleged that, between April 2017 and September 26, 2017, her decedent was seen by physicians at Mount Sinai, and hospitalized thereat during August 2017 and September 2017, and that Mount Sinai committed malpractice by, among other things, failing to diagnose and treat her decedent for tuberculosis, thus delaying treatment, thereby causing fluid to accumulate in her lungs, which, in turn, caused the infection to spread from her lungs to her liver, spleen, fallopian tube, and gall bladder, ultimately resulting in her death on September 26, 2017.

As relevant to this motion, on June 4, 2021, the parties participated in a private mediation session with mediator Shelley Rossoff Olsen, Esq., of the alternative dispute resolution firm JAMS. On that date, the parties reached a global settlement in the sum of \$795,000, pursuant to which NJH agreed to contribute \$75,000, Archcare agreed to contribute \$45,000, and Mount Sinai agreed to contribute \$675,000. The agreement was reduced to writing, and executed by the mediator on behalf of the attorneys for all four parties. On June 7, 2021, at the request of Mount Sinai's attorneys, the plaintiff's attorney confirmed, in writing, with the express knowledge, approval, and consent of the plaintiff, that the action had been settled with Mount Sinai for \$675,000. The plaintiff's attorney thereafter sent similar confirmatory emails to the attorneys for the other two defendants, confirming the settlement amounts..

On January 20, 2022, the plaintiff petitioned the Surrogate's Court, New York County, for leave to compromise and settle the causes of action to recover for her decedent's conscious pain and suffering and wrongful death, and for a judicial settlement of her account, so as to distribute the proceeds thereof. In her Surrogate's Court petition, the plaintiff attested to the

accuracy of the accounting submitted therewith, and requested that court to permit her to compromise and settle the claims against all defendants for a total of \$795,000.

In a decree dated March 24, 2023, the Surrogate's Court (Mella, S) granted the petition, and authorized the plaintiff to settle the action for \$795,000. In June 2023, Mount Sinai's attorney prepared settlement documents for the plaintiff's execution, and delivered them to her attorney for that purpose. Notwithstanding the settlement agreement, the Surrogate's Court's decree, and the defendants' preparation of settlement documents, the plaintiff communicated with her attorney, asserted that she was unhappy with the settlement, and informed him that she wished to vacate the settlement agreement, reopen the action, and attempt to obtain a higher settlement amount from the defendants. Thus, on or about June 19, 2023, the plaintiff's attorney advised Mount Sinai's attorney that the plaintiff refused to sign any of the settlement closing documents. The plaintiff's attorney had similar communications with the attorneys for the other two defendants. The instant motions ensued.

In the first instance, NJH's application was not a proper cross motion because it did not seek relief against a moving party; instead, its motion was, in effect, a separate motion seeking relief against a nonmoving party (see CPLR 2215; *Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Guzetti v City of New York*, 32 AD3d 234 [1st Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]; *Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]; *Lucheux v William Macklowe Co., LLC*, 2017 NY Slip Op 31044[U], 2017 NY Misc LEXIS 187 [Sup Ct, N.Y. County, May 11, 2017]). CPLR 2214(b) requires such a separate motion to be made on at least eight days' notice. The mislabeling of a motion as a cross motion, however, may be treated as a "technical" defect to be disregarded, particularly where the nonmoving party does not object and the consideration of the application results in no prejudice to the nonmoving party (see *Sheehan v Marshall*, 9 AD3d at 404), and where, as here, the moving party made its application more than eight days prior to the return date, thus giving the plaintiff ample opportunity to be heard on

the merits (see *Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011]; *Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]; *Della-Mura v White Plains Hosp. Med. Ctr.*, 2022 NY Slip Op 31085[U], *3, 2022 NY Misc LEXIS 1697, *3-4 [Sup Ct, N.Y. County, Mar. 31, 2022] [Kelley, J.]). Hence, NJH's "cross motion" may be considered as a properly noticed separate motion (see *Matter of Jordan v City of New York*, 38 AD3d at 338).

Settlements "are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). CPLR 2104 provides that "[a]n agreement between the parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney." Nonetheless, "a binding agreement may be assembled from more than one writing" (*Nolfi Masonry Corp v Lasker-Goldman Corp.*, 160 AD2d 186, 187 [1st Dept 1990]). Consequently, where all of the essential terms of a settlement agreement are set forth in documents and correspondence executed by counsel, including those executed electronically and exchanged via email, that agreement is enforceable (see *Matter of Philadelphia Ins. Indem. Co. v Kendall*, 197 AD3d 75 [1st Dept 2021]; *Jimenez v Yanne*, 152 AD3d 434, 434 [1st Dept 2017]; *Forcelli v Gelco Corp.*, 109 AD3d 244, 248 [2d Dept 2013]; *Kasowitz, Benson, Torres & Friedman, LLP. v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012]; *Travelers Cas. Ins. Co. of Am. v J. Thomas Constr.*, 2020 NY Slip Op 32764[U] [Sup Ct, N.Y. County, Aug. 25, 2020]; cf. *Mark Bruce Intl., Inc. v. Blank Rome, LLP*, 60 AD3d 550, 551 [1st Dept 2009] [terms set forth in e-mail exchange were too indefinite]). In the instant matter, the settlement agreement was reached in the course of a mediation and executed, on one document, by the mediator on behalf of all of the attorneys for the parties, with the consent of the attorneys and the parties. Written settlement agreements that arise from a mediation proceeding are presumptively enforceable, absent proof of fraud, duress, or overreaching, none of which is present here (see *Ebaid v PV Holding Corp.*, 210 AD3d 741, 742 [2d Dept 2022]).

It is of no moment that a party is not present at the time that the attorney executes and dispatches a written settlement agreement (see *Pruss v Infiniti of Manhattan, Inc.*, 180 AD3d

163, 168 [1st Dept 2020]; *Jimenez v Yanne*, 152 AD3d at 434; *Forcelli v Gelco Corp.*, 109 AD3d at 248; *Williamson v Delsner*, 59 AD3d at 291; *Clark v Bristol-Myers Squibb & Co.* [In re *Silicone Breast Implant Litigation*], 306 AD2d 82, 84-85 [1st Dept, 2003]), even where the attorney does not have actual, but only apparent, authority to settle the matter (see *Pruss v Infiniti of Manhattan, Inc.*, 180 AD3d at 168; *Wil Can (USA) Group, Inc. v Zhang*, 73 AD3d at 1167; *Clark v Bristol-Myers Squibb & Co.* [In re *Silicone Breast Implant Litigation*], 306 AD2d at 85). In any event, in the instant matter, the plaintiff's attorney had complete authority to settle the case, and received permission to settle the matter for the amount agreed upon, subject to any conditions necessary to the effectuate the agreement (see *Kowalchuk v Stroup*, 61 AD3d 118, 122 [1st Dept 2009]; see also *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]; *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [1st Dept 2008]).

The plaintiff's personal refusal to sign the final documentation necessary to effectuate the settlement agreement does not obviate or negate the agreement. "When parties enter into a preliminary agreement, anticipating that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the contract" (*Wronka v GEM Comm. Mgt.*, 49 AD3d 869, 871 [2d Dept 2008]; see *Netherlands Ins. Co. v Endurance Am. Specialty Ins. Co.*, 157 AD3d 468, 469 [1st Dept 2018]; *Banc of Am. Sec. LLC v Solow Bldg. Co. II, LLC*, 77 A.D.3d 533, 534 [1st Dept 2010]; *Bed Bath & Beyond Inc. v Ibex Constr., LLC*, 52 AD3d 413, 414 [1st Dept 2008]; *Pescatore v Manniello*, 19 AD3d 571 [2d Dept 2005]).

The settling defendants established that the signed mediation agreement constituted a written agreement between them and the plaintiff that effectuated a meeting of the minds as to all of the terms of the settlement agreement. They further demonstrated that the email confirmations were electronically signed by the plaintiff's attorney. They also have shown that their exchanges confirmed an agreement binding upon their clients. The plaintiff herself has advanced no basis for setting aside a settlement agreement, and her mere post-settlement dissatisfaction with the settlement amount does not constitute a valid ground for vacating the

agreement (see *Hallock v State of New York*, 64 NY2d at 230). Moreover, the requirement that the plaintiff must execute both the releases, hold harmless agreements, and stipulations of discontinuance does not create an unaccepted counterproposal; rather, those are statutory requirements, without which no settlement can be finalized (see CPLR 5003-a).

In light of the foregoing, it is,

ORDERED that the motion of the defendant The Mount Sinai Hospital to enforce the settlement agreement between it and the plaintiff, entered into on June 4, 2021, is granted; and it is further,

ORDERED that the separate motion of the defendant The New Jewish Home, incorrectly denominated as a cross motion, to enforce the settlement agreement between it and the plaintiff, entered into on June 4, 2021, is granted; and it is further,

ORDERED that the plaintiff is directed forthwith to execute the settlement documentation, as agreed upon by her attorney and the attorneys for all of the defendants, in the form previously agreed upon, including the hold harmless agreements and the general releases, and the plaintiff's attorney shall thereupon execute and file the relevant stipulations of discontinuance.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

12/11/2023

DATE

MOTION 1:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

MOTION 2:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE
 NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE