

Schoonover v Diaz
2023 NY Slip Op 35322(U)
July 5, 2023
Supreme Court, Albany County
Docket Number: Index No. 901667-19
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KEITH R. SCHOONOVER,

Plaintiff,

-against-

DECISION AND
ORDER

GEORGE C. DIAZ ET AL.,

Defendants.

Index No. 901667-19

July 5, 2023

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

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Hartman, J.

Defendants George Diaz and Mary R. Vazquez (hereinafter the driver defendants) move for an order compelling plaintiff Keith R. Schoonover to tender to the driver defendants' counsel executed settlement documents within 30 days.¹ Barring that, the driver defendants demand that the Court dismiss the complaint. Plaintiff opposes. The motion is denied.

Background

This case stems from injuries that plaintiff alleges were sustained during the course of his work duties on March 29, 2016, when a vehicle driven by Diaz struck him with their motor vehicle. This litigation ensued, complicated by the relationships among the various parties and the circumstances of plaintiff's alleged injury: plaintiff was in the employ of a subcontractor of defendant Hospitality Specialist LLC, and at the time of the alleged injury was working on improvements to the hotel where Diaz was employed. That hotel was owned by defendant Albany Downtown Hotel Partners, LLP, which, in turn, was owned by defendant Banyon Investment Group, Inc.. Plaintiff sued everyone on various theories of liability, while Albany Downtown Hotel Partners asserted cross-claims against the driver defendants for contribution and/or indemnity, as well as third-party claims against Hospitality Specialist. A

¹ As noted in the Court's November 18, 2022 Decision and Order, Vazquez is deceased.

detailed account of this case's history is set out in the Court's November 18, 2022 Decision and Order (entered November 21, 2022), which the driver defendants attached to this motion. For present purposes, all that bears mentioning is that the Court granted plaintiff summary judgment on the issue of liability on his negligence claim against the driver defendants, dismissed the cross-claim for indemnity against the driver defendants, and denied the motion to dismiss the cross-claim for contribution from the driver defendants.

As to events relevant to the instant motion, Attorney Santola, representing plaintiff, wrote to the Court on December 22, 2020, advising that plaintiff had conditionally accepted a \$15,000 settlement offer from Nationwide Insurance resolving claims against the driver defendants, contingent upon Workers' Compensation agreement to waive any right to a lien thereon and plaintiff's ability to maintain his action against the remaining defendants. Later in the letter, Attorney Santola contended that plaintiff's claims against the hotel owners would be unaffected by the settlement because their indemnification cross-claim against the driver defendants was not viable. Regardless, by letter dated July 1, 2021, Attorney Santola informed the Court that plaintiff demanded \$50,000 and was rejecting Nationwide's \$15,000 offer.

According to the affidavit of Helen Hom, a Nationwide representative, behind-the-scenes settlement negotiations continued, eventually culminating in plaintiff's November 18, 2021 acceptance of a \$40,000 settlement offer.

Nationwide's offer, however, was contingent upon dismissal of the indemnification cross-claim and plaintiff's assumption of the risk of any claim of contribution at trial.

The Court held a conference on December 2, 2021. According to Attorney Culkin, plaintiff's attorney advised the Court that plaintiff had agreed to settle for \$40,000. Attorney Culkin also represents that the settlement was "confirmed" in a March 18, 2022 conference. And then, this Court dismissed the indemnification cross-claim against Diaz and Vazquez by way of the above-mentioned November 18, 2022 Decision and Order. In Attorney Culkin's view, that decision essentially satisfied the conditions of Nationwide's \$40,000 settlement offer a year earlier, and therefore "the settlement can now proceed." Counsel for plaintiff disagree, contending that the settlement agreement was not reduced to writing or placed on the record in open court. Moreover, he argues, the Court's November 18, 2023 decision did not dismiss cross-claims for contribution.

The Court agrees with plaintiff that there is no basis to deem that the parties had reached a final settlement. The driver defendants concede that where, as here, a settlement is not reduced to a writing, only "one made between counsel in open court" is binding (CPLR 2104). Their main argument is that the conferences held on December 2, 2021, and March 18, 2022, wherein the settlement was discussed, suffice to satisfy the open-court requirement.

But CPLR 2104 “admits of no exceptions” (*Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]). As the Court of Appeals put it, “to allow the enforcement of unrecorded oral settlements would invite an endless stream of collateral litigation over the settlement terms” (*id.*). There is no recording of the terms of the agreement between plaintiff and the driver defendants that even comes close to an open-court oral stipulation. Given that impoverished record, the Court declines to compel plaintiff to accept Nationwide’s offer.

The driver defendants’ reliance on *Golden Arrow Films v Standard Club of California* (38 AD2d 813 [1st Dept 1972], *lv granted* 30 NY2d 286 [1972]) is misplaced. There, because a court reporter was not available after the parties’ settlement negotiations when they were ready to put their agreement on the record, the judge stepped in and “made detailed, complete notes of the settlement terms” instead (*id.* at 814). Here, the December 2, 2021 and March 18, 2022 case management conferences were not convened for the purpose of memorializing a settlement. And the Court’s notes for those dates recite only that a settlement agreement was reached in the amount of \$40,000; the Court made no record of any other terms of that agreement. Thus, even if the Court considered the conferences “open court” for CPLR 2104 purposes, there is no evidence that, during either of those conferences, the parties entered an oral stipulation “contain[ing] all of the material terms and evinc[ing] a clear mutual accord between” them (*Birches at Schoharie, L.P. v Schoharie Senior Gen.*

Partner LLC, 169 AD3d 1192, 1194 [3d Dept 2019]). Accordingly, the request to compel plaintiff to accept the \$40,000 settlement is denied.

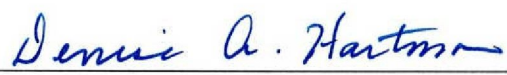
As to the driver defendants' alternative request for dismissal, the Court acknowledges their frustration that the agreement to settle in principle was not ultimately consummated. But nothing in the motion speaks to why the driver defendants—who have already been adjudicated liable—should be allowed to pack up and go home. If the parties cannot now come to terms on damages, the Court will hold an inquest. Consequently, their request to dismiss the complaint is denied.

And so it is

ORDERED that the motion by defendants Diaz and Vazquez is denied.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
July 5, 2023


HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered
NYSCEF Doc Nos. 155-167



07/05/2023