SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 402537/2011
MCCOY, BARBARA
vs.
PREMIER HOME HEALTH CARE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 22, 2012

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
   ☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BARBARA MCCOY,

INDEX NO. 402537/11

Plaintiff,

-against-

PREMIER HOME HEALTH CARE,

Defendant.

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JOAN A. MADDEN, J.:

Defendant Premier Home Health Care ("Premier") moves for an order dismissing the complaint pursuant to CPLR 3211(a)(5) based on plaintiff Barbara McCoy's ("McCoy") prior release of all claims against Premier in an action in federal court, and for failure to state a cause of action.[1] McCoy, who is appearing *pro se*, opposes the motion.

From December 8, 2008 through April 12, 2009, Premier employed McCoy as a home health aide. On or about August 17, 2010, McCoy, appearing *pro se,* commenced an action against Premier in the United States District Court, Southern District of New York, asserting claims for employment discrimination, including retaliation and harassment, based on race, religion and disability ("the Federal Court action") On April 15, 2011, United States Magistrate Judge Andrew J. Peck issued an order of partial dismissal, which dismissed on consent, plaintiff's religious and disability discrimination claims, and continued the case as limited to McCoy's Title VII race discrimination claim

[1]Premier also moved to dismiss pursuant to CPLR 3211(a)(4) on the grounds of another action pending, asserting that McCoy had commenced a prior action in the Civil Court of the City of New York involving the same parties alleging the same causes of action based on the same facts. While this motion was pending McCoy discontinued the Civil Court action so that this ground for dismissal no longer exists.

On May 17, 2011, the parties appeared before Magistrate Judge Peck for a conference, during which McCoy and Premier, by its counsel, reached a settlement agreement. McCoy initially estimated that her case-related expenses for psychiatry, photocopying and transportation totaled $1,000 and she stated that she would settle the case for $1,000. She then lowered her demand to $500. The record indicates that McCoy believed the settlement was intended to cover her litigation expenses and the back pay wages that Premier owed her for several years. Premier initially stated that they would settle for $200, but agreed to settle for $300. The court placed the settlement agreement on the record, as follows:

THE COURT: All right, The Court enters the settlement agreement as follows: This case is settled, without any admission of fault or liability by the defendant, on the following terms:

Defendant will pay the sum of $300 to Ms. McCoy by no later than May 31st. This case is, and will be, dismissed with prejudice and without costs, provided, however, that Ms. McCoy can come back to the Court for enforcement in the event that payment is not made as pursuant to the settlement agreement.

Ms. McCoy hereby releases Premier Home Healthcare Services Incorporated, its officers, agents, employees, subsidiaries, and affiliates and any others in association with Premier, from any and all claim that Ms. McCoy asserted in this lawsuit or that she could have asserted in this lawsuit, or that in any way she would have against Premier Healthcare for any reason, from the usual words of the Blumberg release form, from the beginning of the date of the world, to the date of this settlement agreement and release.

Ms. McCoy, do you agree to the terms of the settlement as I have just described them?

MS. MCCOY: Judge, does this mean this court, you're talking about?

THE COURT: That means this case is over, but if they don't pay you, you write me a letter and I'll deal with them.

MS. MCCOY: OK.

THE COURT: And I have every reason to expect that Mr. Perez, as an officer of the court, will ensure that since his neck is on the chopping block, that his client, having agreed to the settlement, will make the payment.

MS. MCCOY: I understand.

THE COURT: So with that understanding, do you agree to the terms, Ms. McCoy?

MS. MCCOY: I agree.

THE COURT: All right. Mr. Perez, are you authorized by Premier Home Healthcare Services Incorporated, the defendant, to enter into the settlement agreement?

MR. PEREZ: Yes, your Honor.

THE COURT: And on behalf of Premier, do you agree to the terms of the settlement, which is to say that Ms. McCoy will be paid $300 by the end of this month?

MR. PEREZ: Yes, your Honor.

THE COURT: All right.

MR. PEREZ: Can I just add one thing?

THE COURT: Yes.

MR. PEREZ: Ms. McCoy had called me and indicated that we shouldn't send anything else certified mail. I just want to be sure that I can send a check certified mail and that she will go to the post office and get it.

THE COURT: Yeah, I think for safety on that, that should be sent certified. Send a copy to the Court as the same time so I know that you have indeed paid. In addition, I'll direct you to purchase the transcript, which contains the terms of the settlement. I will be mailing Ms. McCoy and faxing to Mr. Perez a short form order of dismissal. All right. Thank you both.

MS. MCCOY: Thank you, your Honor.

THE COURT: And with that, we're adjourned.

MS. MCCOY: Thank you

MR. PEREZ: Thank you, your Honor.

On May 17, 2011, Magistrate Judge Peck issued an Order of Dismissal on Consent, which states in its entirety as follows: "Based on the settlement agreement reached by all parties and transcribed by the court reporter on May 17, 2011, and on the stipulation of the parties pursuant to 28 U.S.C. 636(c), IT IS HEREBY ORDERED THAT this action is dismissed with prejudice and without costs. Any pending motions are to be terminated as moot. SO ORDERED."

On September 21, 2011, McCoy, appearing *pro se,* commenced the instant action against Premier, seeking damages in sum of $1 million for breach of contract, loss of job reimbursement, emotional stress, violation of rights, and costs. The complaint alleges that, "[d]uring course of employment, Plaintiff was discriminated on by defendant, retaliation, harassment, religion, disability, unpaid wages, terminated from employment, not of Plaintiff free will but by Defendant abusing their power."

Premier now moves to dismiss the complaint on the grounds of a prior release, and for failure to state a cause of action, asserting that the May 17, 2011 settlement and release in the Federal Court action bars all claims asserted in the complaint in the instant action.

In opposition, McCoy submits an affidavit in which she asserts that the $300. settlement covered only her claim for unpaid wages. She contends that "[i]n court the judge said this case was over for the unpaid wages," and that she accepted the $300 offer because "I could not get more also the other charges were never heard." Plaintiff asserts that she did not agree to waive her right to sue the defendant for unlawful dismissal. She states that an official at the EEOC (Equal Employment Opportunity Commission) advised her that the retaliation, religion, and disability charges were never raised and she disputes the defendant's statement that she had the opportunity to be heard for these charges. She asserts, "I was advised by the EEOC that I could sue Defendant in state court."

In reply, defendant contends that McCoy is unfairly seeking to re-litigate the same claims and issues that she raised in the Federal Court action. Defendant argues that McCoy was afforded a full and fair opportunity to have her claims of discrimination heard in the Federal Court action and that McCoy willingly agreed to settle those claims and fully release defendant from further liability in connection with those claims. Defendant also argues that the initial 2009 EEOC file submitted by McCoy further supports its position, since the EEOC issued a Dismissal and Notice of Rights letter to McCoy, which advised her of her right to file a lawsuit against defendant in "federal or state court," (emphasis supplied).

"[I]t is firmly established that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties." Skluth v. United Merchants & Mfrs., Inc., 163 AD2d 104, 106 (1st Dept 1990)(internal quotation omitted). Furthermore, a stipulation of settlement made in open court is binding and enforceable. See CPLR 2104; Hallock v. State, 64 N.Y.2d 224, 230 (1984); Sontag v. Sontag, 114 AD2d 892 (2d Dept 1985), appeal dismissed, 66 NY2d 554 (1986); Melwani v. Jain, 2004 U.S. Dist. LEXIS 7590, *14 (SDNY 2004). Public policy favors the enforcement of a settlement agreement that is placed on the record by the court, since "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, 64 N.Y.2d at 230. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." (Id., citing In re Fruitger's Estate, 29 NY2d 143, 149-150 (1971).

A party's lack of representation is a significant factor to be considered in determining whether good cause exists to vacate a stipulation. 144 Woodruff Corp. v. Lacrete, 154 Misc.2d 301 (N.Y. Civ. Ct. 1992); Cabbad v. Melendez, 81 AD2d 626 (2nd Dep't 1981). Notably, however, lack of representation is insufficient alone to invalidate a stipulation. Melwani v. Jain, 2004 U.S. Dist. LEXIS 7590. In this connection, courts have denied application to vacate a stipulation of settlement entered into by a *pro se* litigant where it is shown that the court followed sufficient procedures to protect the pro se litigant. Id.; Johnson v. Nationwide Ins. Co., 2002 WL 31748591 (NY Civ. Ct. 2002); but see, 44 Woodruff Corp. v. Lacrete 154 Misc2d at 303 (stipulations vacated due to

unfairness where a *pro se* tenant failed to assert a substantial defense to the landlord's claims in the proceeding and the one-sided stipulations required payment of rent well in excess of the legal amount).

Here, by the clear and express terms of the May 17, 2011 settlement and release in open court on the record, McCoy agreed to release Premier from "any and all claims that McCoy asserted in this lawsuit or that she could have asserted in this lawsuit or that in any way she would have against Premier Healthcare for any reason, from the usual words of the Blumberg release form, from the beginning of the date of the world, to the date of this settlement agreement." Moreover, as pointed out by Premier, the Notice from the EEOC indicates that McCoy could bring her claim in federal or state court and not in both forums (emphasis supplied). During oral argument, McCoy stated that a worker from the EEOC named Paul told her over the phone that she could re-file her action in state court after receiving the settlement letter from federal court. However, this statement is contrary to the documentation that she received from EEOC, which explicitly stated that her claim could be asserted in "federal or state court."

In any event, to the extent that there may be a basis for vacating the stipulation based on McCoy's asserted confusion about the impact of the settlement on her right to bring further claims for discrimination in state court,[2] as the settlement was made in federal court, any request to vacate it must be made there to the Magistrate who approved the settlement. See Childs v. Levitt, 151 AD2d 318, 320 (1st Dept 1989)(proper procedure for seeking relief from stipulated settlement entered in federal court is an

[2]In particular, this confusion can be inferred by McCoy's question to Magistrate Peck that "Judge, does this mean this court, you're talking about?" and his response that "that means this case is over..."

application to the federal court which approved the stipulation). Therefore, as the broad release bars the instant action and this is not the proper forum to seek to vacate the release, the motion to dismiss must be granted.[3] Id.; See also, Mosberg v. National Property Analyst, Inc., 217 AD2d 482 (1st Dept 1995); Marshall v. Stark, 276 AD2d 601 (2d Dept 2000).

Accordingly, it is

ORDERED that defendant Premier Home Health Care's motion to dismiss the complaint is granted, and the complaint is hereby dismissed and the Clerk is directed to enter judgment accordingly.

DATED: October 22, 2012

J.S.C.

FILED

OCT 25 2012

COUNTY CLERK'S OFFICE NEW YORK

[3]The dismissal is without prejudice to McCoy bringing an action in the event the release is vacated by the federal court.