Mayo v NYU Langone Med. Ctr.
2018 NY Slip Op 33391(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 805036/12
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

---------- X INDEX NO. 805036/12

DANIEL MAYO, as the Administrator of the Estate of
ANNETTE MAYO, deceased.

Plaintiff

-against-

NYU LANGONE MEDICAL CENTER,

Defendant.

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JOAN A. MADDEN, J.:

Defendant moves for an order (i) granting reargument of the court's decision and order dated March 13, 2018 ("the original decision") and, upon reargument, (ii) vacating the original decision, which granted plaintiff's motion seeking, *inter alia*, to declare a January 20, 2016 Settlement Agreement ("Settlement Agreement") null and void, and (iii) declaring that the Settlement Agreement is binding and enforceable. Plaintiff opposes the motion.

Background

This action for medical malpractice arises out of treatment and care of Annette Mayo ("the decedent") at the defendant hospital, where she was initially treated on November 9, 2010 for a total hip replacement. It was alleged that defendant failed to timely diagnose decedent with Clostridium difficile, and failed to secure and supervise decedent who was prone to falling out of bed.

From October 2014 to January 2016, the parties appeared in court for a number of pre-trial conferences. On January 15, 2015, the Center for Medicare and Medicaid Services ("CMS") sent a conditional payment letter requesting $2,824.50 in overpayment, and attached a payment

summary form listing the claims adding up to the total.[1] The letter advised that "the conditional payment amount listed above is an interim amount. We are still reviewing medical claims related to your case." On July 21, 2015, CMS sent another conditional letter requesting $1,811.95 for overpayment, which letter contained the same language as to January 15, 2015 letter, advising that the amount listed was an interim amount and was still being reviewed. Plaintiff's counsel provided defense counsel with the conditional lien letters prior to settlement.

By letter dated January 5, 2016, which was copied to defendant's counsel, plaintiff notified the court that the action had been settled for $725,000 "inclusive of all liens, attorneys fees, etc, without costs to either side.[2]" By letter dated January 6, 2016, plaintiff's counsel wrote defendant's counsel that "[t]he final medicare lien amount is $1,811.95," and requested that he forward releases. Also, on January 6, 2016, plaintiff's counsel signed a stipulation of discontinuance, which was never filed.

On January 6, 2016, counsel for defendant sent plaintiff's counsel the Settlement Agreement, a nine-page document, which provides, *inter alia*, that in consideration for plaintiff releasing and discharging defendant:

> The Insurer shall pay the sum of $725,000 (the "Settlement Sum") to be paid as follows at the time of settlement and delivered to plaintiff's attorney:
>
> A. Medicare-final-is $2,824.50
>
> B. Remaining amount, $722,175.50 payable to "Daniel Mayo" as

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[1]The "conditional payments," referred to in the letter are those payments made by Medicare, for which reimbursement will be sought from a party responsible for payment for the Medicare beneficiary's care, such as a party recovering a personal injury judgment or a defendant or carrier responsible for paying an injured party pursuant to a settlement or judgment.

[2]The letter was addressed to Justice Alice Schlesinger, who was then presiding over the action.

> Executor of the Estate of Annette Mayo and Krentsel & Guzman, LLP, attorneys (i.e. plaintiff's attorneys).

The Settlement Agreement defines "the Parties" to the agreement as the named plaintiff in this action (i.e. Daniel Mayo, as Executor of the Estate of Annette Mayo), and defendant's liability carrier which is identified as CCC520 Insurance SCC (hereinafter "Insurer"). Paragraph 14 of the Settlement Agreement, entitled Effectiveness, states that "[t]his Settlement Agreement shall become effective upon execution by the Parties." Paragraph 13 of the Settlement Agreement, entitled Counterparts, states that "[t]his Settlement Agreement may be executed in one or more counterparts each of which shall be deemed an original, but all of which together shall be deemed to constitute one and the same instrument."

On January 20, 2016, plaintiff and his counsel executed the Settlement Agreement, and on January 22, 2016, plaintiff's counsel sent a letter with the executed Settlement Agreement enclosed and requested payment. On that same date, CMS sent a final lien letter notifying plaintiff that Medicare was seeking repayment of $145,764.08 for the cost of the decedent's medical care, and attached a list of its payments made on decedent's behalf. By letter dated February 2, 2016, plaintiff's counsel challenged Medicare's demand amount writing, *inter alia*, that:

> After the plaintiff accepted the settlement in reliance on the $1,811.95 amount stated in the July 15, 2015 letter, we informed Medicare of the settlement and awaited a demand letter fully expecting it to be lower than the conditional payment amount cited in accordance with our prior dealings with MSPRC (i.e. Medicare Secondary Payer Recovery Contractor). Instead, we were shocked to receive the January 22, 2016 letter with a demand amount of $145,764.08....It is unclear where this demand amount is coming from, however, this settlement offer was made only in contemplation of decedent's pain and suffering and not for her medical bills which are not part of the settlement amount....

By letter dated March 3, 2016, Medicare upheld its previous determination. In addition, on September 8, 2016, the Qualified Independent Contractor ("QIC")[3] issued an unfavorable reconsideration decision upholding the prior determinations.

Plaintiff next sought reconsideration before an Administrative Law Judge ("ALJ") from the Office of Medicare Hearings and Appeals.[4] By decision and order dated May 15, 2017, the ALJ found that plaintiff was responsible for the conditional payments, plus interest.

In the meantime, neither defendant nor the Insurer signed the Settlement Agreement, nor did the Insurer proffer payment in accordance with paragraph 4 of the Settlement Agreement, under which plaintiff waived the 21-day payment provision provided under CPLR § 5003-a, and "agree[d] that payment of the above settlement amount shall be made within 45 business days of receipt of the fully executed Settlement Agreement and Release." In addition, judgment was never entered, and no stipulation of discontinuance has ever been filed.

Plaintiff's Motion

Plaintiff moved pursuant to CPLR 2104 to declare the Settlement Agreement null and void, arguing that it was entered into under an erroneous assumption based on the conditional letters from Medicare that the maximum amount that Medicare would assert for its lien was $2,824.50.[5] Moreover, plaintiff argued that there has been no change in position since the

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[3]QIC's conduct second level appeals with respect to, *inter alia,* Medicare and Medicaid appeals.

[4]Plaintiff previously filed a petition in federal court, which was dismissed for lack of subject matter jurisdiction, apparently for failure to exhaust administrative remedies.

[5]Contrary to defendant's position at oral argument, the issue of mistake, including mutual mistake was raised by plaintiff in his motion to vacate and, in defendant's opposition, it argued there was no mutual mistake.

Settlement Agreement was entered as defendant had not yet proffered payment and plaintiff had yet to enter judgment based on such failure, and no stipulation of discontinuance has been filed. Alternatively, plaintiff argued that the Settlement Agreement is defective since although it purports to release defendant from "other Liens and Claims," it is ineffective to relieve defendant of the Medicare Lien as the Settlement Agreement provides for the payment of a lien in the maximum amount of $2,824.50, even though Medicare may still enforce its rights against defendant's insurer.

Defendant opposed the motion, asserting that the Settlement Agreement is enforceable as it satisfies the writing requirement of CPLR 2104, and that there was no grounds for vacating it, as the agreement was entered into as the result of plaintiff's unilateral error in failing to ensure that the amount of the Medicare lien was correct and the responsibility of investigating the amount of the Medicare liens was the sole responsibility of plaintiff.

By interim order dated October 23, 2017, the court noted that "there are issues as to whether the [Settlement Agreement] is enforceable as a writing under CPLR 2104 as there is no allegation or evidence that it was signed by defendant," and directed the parties to efile a letter brief regarding this issue.

In its letter brief, defendant argued that the language of CPLR 2104 demonstrates that the Settlement Agreement is binding upon plaintiff since it was signed by plaintiff and his attorney, that the clear and unambiguous language of the Settlement Agreement shows that it should be enforced according to its terms, and that although the agreement provides that it is not effective unless executed by the parties, the construction and drafting of the agreement, including the purported absence of signature lines for defendant, demonstrates that no signature was required of defendant (or its representative) in order to make the agreement binding. Alternatively,

defendant argued that to the extent the court finds the Settlement Agreement ambiguous, parole evidence demonstrates that the agreement is enforceable.

As for plaintiff, he argued that the Settlement Agreement is not binding as it was not filed with the county clerk as required by CPLR 2104,[6] and as plaintiff "was not in possession of any signed stipulations from Defendant or a representative of the Defendant agreeing to resolve this case."

In the original decision, the court found that even assuming that the Settlement Agreement met the minium requirements of CPLR 2104, it was not binding on the plaintiff since it was not executed by the defendant or the Insurer as required under the express terms of the agreement. The court also found that even if the Settlement Agreement were enforceable in the absence of a signature from defendant or the Insurer, it would be subject to vacatur on the grounds of mutual mistake given the more than $140,000 difference between the Medicare lien amount in the Settlement Agreement and the actual amount of the lien.

Defendant's Motion to Reargue

Defendant moves for reargument of the original decision,. arguing that the court erred in finding that Settlement Agreement was not binding and in vacating the agreement on ground of

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[6]In the original decision, the court found that contrary to plaintiff's position, the failure to file settlement agreement with clerk's office and pay the required fee in accordance with CPLR 2104, would appear to be insufficient alone to render the Settlement Agreement unenforceable. See Gleason Commentaries, McKinney's Consol. Laws of N.Y., Book 7B, CPLR 1401 to 2200, CPLR 2104, at 512-513 (2012) ("the legislative history of the amendments [requiring the filing of stipulation of settlement and payment of a fee] makes clear their purpose was to generate revenue [and that]... if a question arises regarding the enforcement of the settlement, it makes sense to allow any defect to be corrected); see also, Pile v. Grant, 41 AD3d 810, 811 (2d Dept 2007)(contention that stipulation was not enforceable as it was not filed with county clerk was not before the court on appeal, but "in any event is without merit").

mutual mistake.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Here, the court grants reargument to clarify the basis for its decision and, upon reargument, adheres to its original decision.

The starting point for the determination as to whether the Settlement Agreement is binding is CPLR 2104, which provides that:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

As noted in the original decision "[t]o be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104 [which as relevant here provides]... that such an agreement be in writing and signed by the parties (or attorneys of the parties) to be bound by it." Headley v. City of New York, 115 AD3d 804, 807 (2d Dept 2014). In addition, the court recognized that an agreement or stipulation with respect a settlement may satisfy the signed writing requirement of CPLR 2104, even if one party fails to sign the agreement, citing Stefaniw v. Cerrone, 130 AD2d at 483(holding that terms of stipulation were binding on defendant despite

the absence of defendant's signature or that of his attorney where plaintiffs' attorney executed the stipulation prepared by defendant without modification and returned it to the defendant's attorney); Williamson v. Delsener, 59 AD3d 291 (1st Dept 2009)(holding that e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings under CPLR 2104); Morrison v. Bethlehem Steel Corp., 75 AD2d 1001 (4th Dept 1980)(holding that "letters acknowledging settlement and signed by plaintiff's attorney satisfy the requirement of a subscribed writing" under CPLR 2014).

That said, however, as noted in the original decision, even if a writing regarding a settlement satisfies the minimum requirement of a signed writing under CPLR 2104, under the rules of contract law, it must also be found that the parties intended to be bound by the agreement's terms in the absence of the signature of defendant or its representative, citing Diarassouba v. Urban, 71 AD3d 51, 57 (2d Dept 2009), lv dismissed 15 NY3d 741 (2010)(noting that "[s]tipulations of settlement are contracts and are, thus, subject to the rules of contract law")(internal citations omitted); De Well Container Shipping Corp. v. Mingwei Guo, 126 AD3d 846, 847-848 (2d Dept 2015)(finding that stipulation of settlement, entitled "Agreement in Principle," was not enforceable where material term of the agreement was contingent on all the parties executing agreement, and the agreement did not state that the two signatories to the agreement intended to bind all the parties to the agreement's terms).

Here, the Settlement Agreement provides that "[it] shall become effective upon execution by the parties," and in the original decision, the court found that this provision was indicative of the parties' intent that it would not be binding until executed by the parties. See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 (1st Dept), lv denied 15 NY3d 423 (2010)(internal citation omitted) ("Generally, where the parties anticipate that a

signed writing is required, there is no contract until one is delivered")(internal citation omitted). In addition, the original decision noted that Settlement Agreement provides that it may be signed in counterparts, indicating an intent to require both parties' signatures, even if not on same document, and that contrary to defendant's argument there was a signature line for both plaintiff and the defendant. Accordingly, the court found that the Settlement Agreement was not binding on the plaintiff since it was not executed by the defendant or the Insurer as required under the express terms of the Settlement Agreement.

Defendant now argues that contrary to original decision, the requirement that the Settlement Agreement be executed by both parties and that it may be signed in counterparts are immaterial as neither party intended to be bound by them. At oral argument, defendant's counsel stated that although the Settlement Agreement contained these provisions, it is "the custom and practice of our office in dealing with plaintiff's office before that a defendant, counsel or defendant itself does not have to sign the agreement" (Transcript of 6/28/18 oral agreement, at 6). In addition, defendant argues that the conduct of the parties before and after the execution of the Settlement Agreement, including plaintiff's demand for payment prior to defendant's signature and its failure to raise defendant's lack of signature in seeking to vacate the agreement, demonstrates that the parties did not intend that defendant sign the agreement.

Defendant also argues that the Settlement Agreement does not contain any signature line for the defendant or its Insurer as defined under the agreement. Specifically, defendant points out that Marsh IAS Management Services (Bermuda) Ltd, as Manager ("Marsh"), is identified over the signature line, whereas CCC550 Insurance SCC, is defined as the "Insurer" and as a party to the agreement. Defendant then asserts "upon information and belief that Marsh is not defendant's insurer" and that it is not "the custom" of its counsel to include a signature line for

the defendant or its insurer.

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 AD3d at 426. In general, a written contract signed by the parties is not necessary to form a contract as long as the agreement contains its essential terms, and "there is objective evidence establishing that parties intended to be bound." Flores v. Lower E. Serv Ctr., Inc., 4 NY3d 363, 369 (2005). However, "[i]t is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." Jordan Penal Systems, Corp. v. Turner Const Co., 45 AD3d 165, 166 (1st Dept 2007), quoting Scheck v. Francis, 26 NY2d 466, 469–470 (1970); see also Keitel v. E*Trade Financial Corp., 153 AD3d 1181 (1st Dept 2017), lv denied, 31 NY3d 903 (2018)(holding that there was no enforceable contract based on term sheet which stated, inter alia, that "neither party shall be bound until parties execute a more formal agreement").

Here, as found in the original decision, the parties' intent not to be bound by the Settlement Agreement unless it was signed by both parties is manifest in the terms of the Settlement Agreement which provides that it will not be effective until executed by both parties, and that it may be signed in counterparts. See Scheck v. Francis, 26 NY2d at 494 (finding that agreement should not be enforced where agreement was not signed by both parties as provided for in their agreement). Nor does defendant's apparent error in identifying the insurer above the signature line create any ambiguity as to the requirement that defendant must execute the Settlement Agreement for it to be effective and, in any event, any ambiguity in this regard would

be construed against defendant as the party which drafted the agreement. See Computer Associates Intern, Inc. v. U.S. Balloon Mfg. Co., Inc., 10 AD3d 699 (2d Dept 2004)(noting that "any ambiguity in contract language must be construed against the party that drafted the contract").

Moreover, while defendant argues that the parties' conduct shows that they did not intend to require defendant to sign the agreement, and that the requirement is immaterial along with the provision permitting signing in counterparts, in the absence of any ambiguity as to the signing requirement, the conduct of the parties is generally not examined to determine a contract's meaning. Goldman v. White Plains Center for Nursing Care, LLC, 11 NY3d 173, 176 (2008) ("a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic materials outside the four corners of the document")(internal citation and quotation omitted).

Furthermore, even if the court were to consider the conduct of the parties, contrary to defendant' s argument, the record does not demonstrate a clear intent to enforce the Settlement Agreement before defendant signed it. In this connection, the court notes that defendant does not submit any evidence, such as affidavits to support its argument as to intent, and counsel's statement that the provisions requiring defendant's signature and as to the counterparts were included inadvertently, are unsubstantiated. Likewise, defendant's argument as to the custom and practice in its counsel's office lacks evidentiary value. In addition, although plaintiff demanded payment after signing the Settlement Agreement despite the absence of defendant's signature, this conduct is not dispositive as defendant never tendered payment, which under the agreement was to be made "within 45 business days of the receipt of the fully executed Settlement Agreement and Release," judgment was not entered, and a stipulation of

discontinuance was not filed.[7] Moreover, with regard to plaintiff's position in this litigation, while plaintiff did not initially seek to vacate the Settlement Agreement on the ground that defendant did not sign it, following the issuance of the court's interim order, he made this argument. In any event, plaintiff's position in this litigation is not dispositive of the parties' intent with respect to the Settlement Agreement.

Next, even if Settlement Agreement were enforceable, the court nonetheless would adhere to its original decision, as the Settlement Agreement is subject to vacatur on the grounds of mutual mistake. In its motion to reargue this aspect of the original decision, defendant argues, as it did originally, that the failure to include the correct amount of the lien was not a mutual mistake since plaintiff was solely responsible for ensuring the correctness of the lien amount, and assumed "a known risk" in settling the action for $725,000. Defendant also argues that settlements are not overturned lightly and that the case was settled and marked disposed based on plaintiff's January 5, 2016 letter to the court.

In view of the policy favoring settlements, and as noted in the original decision, in general, to vacate a stipulation of settlement, the moving party must show that a mutual mistake existed at the time the stipulation was entered that was so substantial that it prevented a meeting of the minds. See Matter of Gould v. Board of Educ. of Sweanhaka Cent. High School District, 81 NY2d 446, 453 (1993). In the original decision, the court found that plaintiff met this burden by demonstrating that the Settlement Agreement was the product of a mutual mistake based on the parties' incorrect belief, as reflected in the record demonstrating that the parties' negotiations

[7]The court recognizes that this conduct also can be attributed to the Medicare's notifying plaintiff of the final amount of the lien. However, such notification would not prevent defendant from tendering payment to plaintiff particularly once it was determined that Medicare was upholding the amount of the lien.

were based on an assumption that the Medicare lien was $2,824.50, when it was actually $145,764.08, and the terms of the Settlement Agreement drafted by defendant reflected this error.

Furthermore, the court held that given the more than $140,000 difference between the two lien amounts, and defendant's potential liability with respect to the Medicare liens, that plaintiff had demonstrated that the error was sufficiently substantial so as to prevent a meeting of the minds as to the $725,000 settlement, citing Mahon v. New York City Health and Hospital Corp., 303 AD2d 725, 725 (2d Dept 2003)(finding that plaintiff met her burden of vacating the settlement when the parties did not consider the impact of Medicaid lien in negotiating a settlement such that there was no meeting of the minds as to the amount of damages).

Defendant argues that Mahon is distinguishable from circumstances underlying the Settlement Agreement since:

> there was joint consideration of the impact of the plaintiff's Medicare lien on settlement and a true meeting of the parties' minds on the final amount of the plaintiff's Medicare lien at the time the [Settlement Agreement] was entered into. The terms of Section 2 of the [Settlement Agreement] are clear and unambiguous, and were a product of intense negotiations spanning over almost two years. The parties participated in multiple pre-trial conferences, discussed the matter at arm's length, and reached an agreement to settle this matter for $725,000 of which $2,824.50 was made payable to Medicare and the remaining amount of $722,175.50 was made payable to plaintiff and his counsel. Letters between counsel in this case confirm these essential terms of the settlement. On January 20, 2016, plaintiff and his counsel executed the [Settlement Agreement] and notarized same. Two days later, on January 22, 2016, plaintiffs counsel sent a letter with the executed [Settlement Agreement] enclosed and requested payment based upon same [and that] Plaintiff's express and undisputed acceptance of the $725,000 settlement offer created a valid and enforceable [Settlement Agreement].

Defendant's argument is without merit as it ignores that the lien amount in the Settlement Agreement was $140,000 less than the actual lien, and that neither party was aware of

this substantial discrepancy at the time of negotiating the agreement and arriving at a settlement amount. Likewise, defendant's reliance on the January 5, 2016 letter from plaintiff's counsel, notifying the court that the action had been settled for $725,000 "inclusive of all liens, attorneys fees, etc, without costs to either side," is misplaced as the letter cannot be said to be binding settlement in light of the parties' intent to reduce their settlement to a formal writing. In any event, the letter, like the Settlement Agreement, was based on an error as to the amount of the Medicare lien.

The court also finds that contrary to defendant's position, Rivera v. State, 115 AD2d 431 (1st Dept 1985) is not controlling here. In Rivera, the Appellate Division, First Department held that a settlement was not to be subject to vacatur based on plaintiff's unilateral mistake with respect to the amount of a compensation lien where plaintiff, who was represented by counsel, acknowledged in open court that he understood the terms of the settlement, including the term pertaining to the compensation lien.

In the original decision, the court noted that the circumstances in Rivera were distinguishable, since that settlement was made in open court and that such settlements are subject to especially strict enforcement, which "not only serves the interest of efficient dispute resolution but also is essential to the management of the court calendar and the integrity of the litigation process." Hallock v. State of New York, 64 NY2d 224, 230 (1984).[8] The court also noted that instead of the settlement being stated on the record in open court, in this case, the settlement was memorialized in a document drafted by defendant after negotiations between the parties. Accordingly, the court found that the error regarding the amount of the Medicare lien in

[8]The original decision erroneously indicated that this quotation was from Rivera.

the Settlement Agreement could not be attributed to a unilateral mistake by plaintiff.

Defendant's argument that contrary to the court's finding, this case cannot be distinguished from Rivera as plaintiff and his counsel were solely responsible for determining the amount of the Medicare lien, and providing the amount of the lien to defendant who incorporated it into the Settlement Agreement is unavailing. Notably, it fails to take into account that in negotiating the settlement neither party considered that the lien amount would be more than $140,000 greater than the $2,824.50, provided for in the Settlement Agreement. See Mahon v. New York City Health and Hospital Corp., 303 AD2d at 725. In addition, although not stated in the original decision, the court notes that defendant, who received the lien letters from plaintiff, knew or had reason to know that the liens were conditional, as opposed to final, so that it cannot be said that plaintiff's mistake was unilateral or that he alone assumed the risk of settlement.

Finally, as found in the original decision, defendant's argument that plaintiff cannot set aside the Settlement Agreement based on a misunderstanding of its terms, or because with the benefit of hindsight he realized it was a bad bargain, is unavailing. Unlike the cases relied on by defendant, the circumstances here involve a factual error at the time the agreement was negotiated as opposed to a misunderstanding as to the agreement's consequences. See e.g. Carney v. Carozza, 16 AD3d 867 (3d Dept 2005)(holding that plaintiff could not avoid a settlement based on alleged misunderstanding of its tax consequences); Childs v. Levitt, 151 AD2d 318, 319 (1st Dept), appeal denied 74 NY2d 613 (1989)(noting that "[e]quity will not relieve a party of its obligations under a contract merely because subsequently with the benefit of hindsight, it appears to have been a bad bargain).

Conclusion

In view the above, it is

ORDERED that defendant's motion to reargue is granted; and it is further

ORDERED that upon reargument, the court adheres to its original decision vacating the Settlement Agreement and restoring the action to the trial calendar in Part 11; and it is further

ORDERED that the parties shall appear for a pre-trial conference on January 17, 2019 at 2:30 pm in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: December 7, 2018

J.S.C.
HON. JOAN A. MADDEN
J.S.C