

**Chaparro v IESI NY Corp.**

2013 NY Slip Op 33722(U)

August 12, 2013

Supreme Court, Bronx County

Docket Number: 304477/2009

Judge: Alison Y. Tuitt

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This opinion is uncorrected and not selected for official publication.

JURT - COUNTY OF BRONX

PART 05

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

Case Disposed   
 Settle Order   
 Schedule Appearance

CHAPARRO, ROLANDO

Index No. 0304477/2009

-against-

Hon. ~~KENNETH F. PATRICK~~

IESI NY CORPORATION

ALISON Y. TUITT Justice.

The following papers numbered 1 to 13 Read on this motion, MISCELLANEOUS  
 Noticed on June 25 2012 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 3/11/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1 2 3 4 5	
Answering Affidavit and Exhibits	6, 7, 8, 9, 10, 11, 12	
Replying Affidavit and Exhibits	13	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motions, cross-motions and  
Order to Show Cause are decided in  
accordance with the annexed  
memorandum decision.

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 8/12/2013

Hon. Alison Y. Tuit  
~~KENNETH F. PATRICK~~, J.S.C.  
 ALISON Y. TUITT



NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

**ROLANDO CHAPARRO and YELENA CHAPARRO,**

Plaintiffs,

-against-

**IESI NY CORPORATION and PGREF I 1633 BROADWAY LAND, L.P.,**

Defendants

INDEX NUMBER: 304477/2009

Present:  
**HON. ALISON Y. TUFT**  
*Justice*

The following papers numbered 1-13,

Read on this Motion/Cross-Motions/Order to Show Cause

Calendar of 3/11/13

Notices of Motion/Cross-Motions/Order to Show Cause-Affirmations, Exhibits 1-5

Affirmations in Opposition 6-12

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Upon the foregoing papers, defendant IESI NY Corporation's (hereinafter "IESI") motion and defendant PGREF I, 1633 Broadway Land, L.P.'s (hereinafter "PGREF") cross-motion to vacate the Order of Justice Kibbie Payne denying motions for summary judgment; the motion of counsel Frederic Lewis to order defendants to pay the settlement and award attorneys' fees, or in the alternative, to set aside the settlement and restore the action to the calendar; cross-motion of counsel Nicholas Kowalchyn to direct that all liens be settled and satisfied prior to the disposition of any settlement proceeds, directing that Frederic Lewis file a Substitution of Attorney, and for a hearing as to Mr. Kowalchyn's attorney's lien for services rendered in this action; and counsel Frederic Lewis' Order to Show Cause to restore the action to the trial calendar. The motions, cross-motions and Order to Show Cause are consolidated for purposes of this decision.

The within is a personal injury action in which plaintiff alleges he sustained serious injuries on

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April 5, 2008 on defendants' premises. Plaintiff alleges that the accident occurred while he was standing on top of a garbage compactor which had been supplied to the premises by defendant IESI. Plaintiff claims that as soon as he stood on top of the compactor, the floor moved downward and he was injured. Plaintiff alleged that the compactor was defective, causing his injuries. Plaintiff retained Frederic Lewis, Esq. to represent him in this action and Mr. Lewis commenced the action on behalf of plaintiffs on or about June 3, 2009. On November 3, 2011, the parties appeared before Justice Paul Victor for a settlement conference and the matter was marked settled in the amount of \$52,500.00, of which defendant IESI agreed to pay \$38,750.00 and defendant PGREF agreed to pay \$13,750.00.

Prior to the November 3, 2011 settlement conference, attorney Mr. Lewis states that he became ill and was confined to the hospital. Mr. Lewis claims that as a result of his hospitalization, attorney Mr. Kowalchyn, who he had previously employed as an attorney, appeared at the settlement conference on Mr. Lewis' behalf and agreed to the settlement. Mr. Lewis claims that Mr. Kowalchyn did not have his authority to settle the case for that amount. He further argues that Mr. Kowalchyn never explained to the plaintiffs that the liens on the case exceeded the total sum of the settlement. There are two lien holders on the proceeds of this case: Human Resources Administration, Department of Social Services in the amount of \$37,074.43 through October, 2011; and Chubb Group of Insurance Companies, Workers' Compensation lien in the amount of \$231,947.00.

Mr. Lewis further claims that Mr. Kowalchyn rushed the plaintiffs into agreeing to the settlement without fully explaining the circumstances of the settlement and the liens. It is curious that Mr. Lewis fails to provide an affidavit from the plaintiffs stating this. While he submits an affidavit from the plaintiff explaining in detail the circumstances of the settlement, nowhere in his affidavit does plaintiff state that he did not agree with the settlement or that he felt rushed or forced to settle the action. Additionally, Mr. Lewis claims that Mr. Kowalchyn was never the attorney for plaintiffs. However, the Consent to Substitute Attorney, which is signed by Mr. Lewis as "Out going Attorney", and "Nicholas W. Kowalchyn", dated December 12, 2011 and filed with the Court on January 9, 2012, squarely contradicts Mr. Lewis position. Both attorneys are engaged in very contentious arguments about wrongdoing. While Mr. Lewis claims that Mr. Kowalchyn was merely appearing on his behalf at the settlement conference, the Consent to Substitute Attorney, which is dated after the date of

the settlement conference, indicates that Mr. Kowalchyn did in fact represent the plaintiffs. Mr. Kowalchyn argues that Mr. Lewis asked him to take over the case because he was retiring from his practice. Mr. Lewis disputes this and says that he always intended and, did in fact, return to work. These arguments, however, are not for this Court to decide. The Court will decide only the specific applications before it.

With respect to the defendants' motion and cross-motion to vacate the decision and Order of Justice Payne, both applications are denied. Defendants argue that the decision and Order denying defendant IESI's motion for summary judgment should be vacated because the decision was rendered after the settlement was reached. The Court finds no basis for vacatur, as contrary to defendants' arguments, the case was not settled prior to the decision being rendered. The decision is dated October 15, 2012 and the settlement was reached on November 3, 2011. Accordingly, the motion to vacate the denial of the summary judgment motion or, in the alternative, an extension of time to file summary judgment motions is denied.

The motion by Frederic Lewis, Esq. seeking an order directing the defendants to forward to him the agreed upon settlement amount; awarding attorneys' fees and sanctions in the amount of \$16,000.00 or, in the alternative, setting aside the settlement and restoring the action to the trial calendar is denied. Mr. Lewis claims he is the attorney for the plaintiffs. That contention is clearly contradicted by the Substitution of Attorney dated December 13, 2011 and filed with the Court on January 1, 2012. Although Mr. Lewis presents to the Court a "Consent to Substitution of Attorneys" dated December 28, 2011, that document is signed only by Mr. Kowalchyn. The Consent was neither signed by the plaintiffs nor by Mr. Lewis. That "Consent" has also not been filed with the Court. Accordingly, at this juncture, Mr. Kowalchyn continues to be the attorney of record for the plaintiffs. Thus, Mr. Lewis has no standing to argue that the settlement monies should be sent to him.

Moreover, Mr. Lewis is not entitled to \$16,000.00 in attorney's fees and/or sanctions from defendants for their failure to issue the settlement checks. Defendants have refused to forward the settlement monies on the grounds that Mr. Kowalchyn has failed to provide all the proper closing documents, including a General Release that includes IESI's settlement amount and a Hold Harmless Agreement. In addition, defendants argued that Mr. Lewis contacted them stating that he was now plaintiffs' counsel but he has failed to provide an executed substitution of counsel.

Regardless of who is counsel for plaintiffs, there is no basis to set aside the settlement and restore the action. New York has a strong public policy of encouraging the resolution of disputes. Stipulations of

settlement "are favored by the courts and not lightly cast aside". Hallock v. State of New York, 64 N.Y.2d 224, 230, (1984). "[A] change of heart is insufficient". Sontag v. Sontag, 495 N.Y.S.2d 65 (2d Dept.1985), lv. dismissed, 66 N.Y.2d 554 (1986), and a settlement agreement will not be set aside merely because the plaintiff, upon reevaluation, has decided that the claim is worth more. See, Muller v. City of New York, 493 N.Y.S.2d 604 (2d Dept.1985). Hallock v. State of New York, 64 N.Y.2d 224, 230 (1984). Only where there is cause sufficient to invalidate a settlement, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a settlement made in open Court. Id. In Hallock, the Court of Appeals dealt with the question of whether it should be plaintiffs, or defendants, who bear the responsibility for an agent's misfeasance in accepting the settlement they claim had been rejected. The Court concluded that plaintiffs had to bear that responsibility, and were relegated to relief against their former attorney for any damages which his conduct may have caused them in accepting a settlement plaintiffs' claimed they had rejected. Id.

In Hallock, the Court held that one of the parties could not be heard to challenge the settlement as he was in court during the entire pretrial conference and did not voice any objection during the negotiation of the settlement. Id. Similarly, here, plaintiffs do not and have not voiced any objection to the settlement. Plaintiffs' objection is that he was not told that there were any liens which defendants wished to have released prior to the payment of the settlement monies. If plaintiffs were not advised that the defendants are entitled to Hold Harmless Agreements and have the right to ensure the liens are paid or compromised as a condition precedent to issuing settlement monies, then the fault lies with plaintiffs' counsel. Any alleged negligence by the plaintiffs' attorney would not provide a reason to set aside the stipulation where the plaintiff was present during the negotiations, the stipulation was read in open court, and the plaintiff did not object to the settlement. See, DeGregorio v. Bender, 771 N.Y.S.2d 388 (2d Dept. 2004). See also, Daniels v. Concourse Animal Hospital, 836 N.Y.S.2d 879 (1<sup>st</sup> Dept. 2007)("Even if these defendants' trial counsel lacked actual authority to enter into the open court settlement, he had apparent authority to do so. It matters not that neither of these defendants was actually present. Their claim of fraud, mistake or accident is unpersuasive."); Hawkins v. City of New York, 833 N.Y.S.2d 894 (1<sup>st</sup> Dept. 2007)("Despite plaintiff's 'rejection' of the City's offer, she is bound by the stipulation of settlement made by counsel in open court even if it exceeded his actual authority. Indeed, plaintiff's counsel exhibited the apparent authority to settle the case, upon which the City relied. As such, '[o]nly

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'. Plaintiff was unable to demonstrate any reason to invalidate the settlement.)(citation omitted).

Frederic Lewis, Esq.'s Order to Show Cause seeking to restore the action to the calendar and setting this matter down for a date certain for trial is denied for the reasons already stated.

Nicholas Kowalchyn cross-moves to direct that any and all liens be settled and satisfied prior to the disposition of any settlement proceedings; directing Frederic Lewis to file with the court a proper substitution of attorney form; and for a hearing on his lien for attorney's fees. With respect to his application that all liens be settled and satisfied, at this juncture, Mr. Kowalchyn is the attorney of record for the plaintiffs. Plaintiffs have not executed or filed a consent to change attorney with the court substituting Mr. Kowalchyn for Mr. Lewis. Mr. Kowalchyn has not moved to be relieved as counsel. Accordingly, as it stands now, Mr. Kowalchyn is responsible for ensuring that the liens be settled and satisfied. Regarding his argument that Mr. Lewis file a consent to change attorney, the Court cannot issue that directive. The Court cannot force plaintiffs to sign a consent to change attorney. It is their choice as to who they want to represent them and up to that attorney whether he desires to represent them. Finally, with respect to Mr. Kowalchyn's application for a hearing on attorney's fees, Mr. Kowalchyn can renew that application once the issues herein have been resolved.

This constitutes the decision and Order of this Court.

Dated: 8/12/2013



Hon. Alison Y. Tuitt