

<b>Pruss v Infiniti of Manhattan, Inc.</b>
2018 NY Slip Op 31095(U)
June 1, 2018
Supreme Court, New York County
Docket Number: 161240/13
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Adam Silvera** **Part 22**

**ETTA (ITTY) PRUSS,**

**Plaintiff,**

**-against-**

**INFINITI OF MANHATTAN, INC., MASSAMBA  
SECK, DENNIS C. BLANCHETTE, JON-PAUL  
RORECH,**

**Defendants.**

**DECISION/ORDER**

**INDEX NO. 161240/13  
MOTION SEQ NO 011**

**ADAM SILVERA, J. :**

Upon the foregoing papers, and after oral arguments, it is ordered that defendants', Infiniti of Manhattan, Inc. and Massamba Seck (hereinafter collectively referred to as the "Infiniti Defendants"), order to show cause to vacate judgment is denied for the reasons set forth below.

**BACKGROUND**

Plaintiff commenced this action for personal injuries resulting from a motor vehicle accident. This action was subsequently settled by all parties, by stipulation of settlement (hereinafter referred to as the "Stipulation of Settlement") dated August 10, 2016, signed by all counsel and so ordered by Honorable George J. Silver. The Infiniti Defendants failed to pay \$5,000,000.00, and plaintiff entered a judgment for such amount against them. The Infiniti Defendants now file the instant order to show cause seeking to vacate the judgment, stay plaintiff from entering a judgment against them, or enter a proposed counter judgment of \$0.00. Plaintiff opposes and the Infiniti Defendants reply.

## DISCUSSION

Preliminarily, the Court notes that the Infiniti Defendants are insured by Tower Insurance Company of New York (hereinafter referred to as “Tower Insurance”) as their primary insurance, and Great American Insurance Company (hereinafter referred to as “Great American”) as their excess insurance. Prior to the settlement, a conservator was appointed for Tower Group Insurance Company and Tower Insurance on July 28, 2016 in an action in California (hereinafter referred to as the “California Action”). Approximately two weeks later this action settled as memorialized in the Stipulation of Settlement. On September 13, 2016, the court in the California Action approved a proposed Conservation and Liquidation Plan for Tower Insurance which, by merger, became Castlepoint National Insurance Company (hereinafter referred to as “Castlepoint”). Thereafter, in October 2016, the appointed conservator for Castlepoint, previously Tower Insurance, rejected the Stipulation of Settlement. On March 30, 2017, the Superior Court in the California Action issued an order finding Castlepoint to be insolvent and placed Castlepoint into liquidation.

As a result of the merger, conservation, and liquidation of Castlepoint in the California Action, several other related actions were filed. One such action was commenced in April 2017 by the Attorney General of the State of New York, as counsel for the Superintendent of Financial Services of the State of New York (hereinafter referred to as the “Superintendent”), and resulted in the appointment of the Superintendent as an ancillary receiver of Castlepoint. In August 2017, Great American commenced an action seeking a declaratory judgment against, *inter alia*, plaintiff herein Etta Pruss and defendant herein Infiniti of Manhattan, Inc. Such action seeks a judgment from the Federal Courts declaring that Great American, as defendant Infiniti of Manhattan, Inc.’s excess insurance, need not act as the primary insurance or pay any outstanding

monies due pursuant to the Stipulation of Settlement. Plaintiff herein filed a notice of claim in the California Action, and in a separate action sued the Superintendent in the New York State Supreme Court to recover payment of the \$5,000,000.00 due from the Infiniti Defendants pursuant to the Stipulation of Settlement. Plaintiff settled that action for \$1,000,000.00 in partial satisfaction of the \$5,000,000.00 outstanding in the instant action. Subsequently, a liquidation action was filed to liquidate Castlepoint, which is currently pending in the New York State Supreme Court.

Although the circumstances surrounding this action are complex, the facts of this case are largely uncontested. Plaintiff was a pedestrian struck by a motor vehicle and sustained serious injuries. All parties consented to settle and entered into the Stipulation of Settlement through counsel on August 10, 2016 in open court. Pursuant to such stipulation, this action settled for \$9,000,000.00 to be paid by defendants as follows: the Infiniti Defendants would pay \$8,875,000.00, co-defendant Dennis C. Blanchette would pay \$100,000.00, and co-defendant Jon-Paul Rorech would pay \$25,000.00. The Stipulation of Settlement further delineates the payment by the Infiniti Defendants in specifying "Tower - \$5 mil; Great American \$3.875 mil.". Order to Show Cause, Schiner Affirmation in Support, Exh. D, Stipulation of Settlement. Thereafter, co-defendants Dennis C. Blanchette and Jon-Paul Rorech paid their portion of the settlement, and the \$3,875,000.00 was also paid by Great American. The only remaining payment at issue herein is \$5,000,000.00 to be paid by the Infiniti Defendants, purportedly by Tower Insurance. It is undisputed that upon the failure of the Infiniti Defendants, through Tower Insurance, to pay the \$5,000,000.00 as per the Stipulation of Settlement, plaintiff entered a judgment against such defendants for \$5,000,000.00 on February 9, 2018. It is further undisputed that plaintiff has been paid \$1,000,000.00 in partial satisfaction of the outstanding

\$5,000,000.00. As such, the current judgment must be corrected to reflect the amount of \$4,000,000.00 rather than \$5,000,000.00.

In support of their motion, the Infiniti Defendants argue that they did not participate in the negotiations, did not have knowledge of the negotiations and settlement, and did not authorize the settlement agreement. The Infiniti Defendants further argue that the attorney who signed the Stipulation of Settlement did not have the authority to settle on their behalf. Lastly, they argue that Article 74 of the Insurance Law exempts prompt payment of monies due under a settlement agreement in accordance with CPLR §5003-a.

In opposition, plaintiff argues that, in reliance of the Stipulation of Settlement, plaintiff executed releases and discontinuances regarding the motor vehicle accident which occurred on September 6, 2013, for which the statute of limitations has now run. Plaintiff also argues that CPLR §5003-a applies and is specifically consented to by counsel for the Infiniti Defendants through email. Plaintiff further argues that counsel represented the Infiniti Defendants and bound them to the Stipulation of Settlement.

Preliminarily, the Court notes that Article 74 of the Insurance Law does not apply herein to exempt the Infiniti Defendants from prompt payment of the monies due under the Stipulation of Settlement pursuant to CPLR §5003-a. In support of such argument, the Infiniti Defendants cite, *inter alia*, cases from the Appellate Division, Second Department, in which the settlement agreements were negotiated with the intent that payment would be made by the liquidator of the insurance company. While it is clear that Article 74 of the Insurance Law would apply to a case where a settlement agreement was made with an attorney appointed by the liquidator, or made with the clear language that payments would be made by the liquidator or from the insurance fund, such is not the case at bar. The cases cited by the Infiniti Defendants are plainly

distinguishable from the instant case wherein it is undisputed that the Stipulation of Settlement was negotiated between plaintiff's counsel and defendants' counsel, and payment pursuant to such settlement was to be made by the Infiniti Defendants' insurance companies. Although a conservator had been appointed for Tower Insurance two weeks prior to the signing of the Stipulation of Settlement, the Court notes that Castlepoint was not found to be insolvent and placed into liquidation until March 30, 2017, over 7 months later. Subsequently, plaintiff commenced an action against the Superintendent for the payment of the \$5,000,000.00 at issue herein. In such action, the Superintendent settled with the plaintiff for \$1,000,000.00. Such settlement explicitly stated that the \$1,000,000.00 settlement was "in partial satisfaction of the plaintiff's claims against CastlePoint National Insurance Company, Infiniti of Manhattan, Inc., Infiniti Financial Service, Infiniti Financial, LLC, and Massemba Seck to the extent of the payment." Order to Show Cause, Schiner Affirmation in Support, Exh. V, Ancillary Receivership Stipulation of Settlement dated November 6, 2017, p. 2. Thus, Article 74 of the Insurance Law is applicable in the instant action only as to the \$1,000,000.00 settlement between plaintiff and the Superintendent. It is undisputed that, at this point, such settlement was satisfied and payment was made to plaintiff in partial satisfaction of the Stipulation of Settlement herein such that plaintiff is free to exercise her legal rights to obtain payment of the remainder of the monies due from the Infiniti Defendants pursuant to the Stipulation of Settlement.

As the Court has found that Article 74 of the Insurance Law is inapplicable, the crux of the matter at hand is whether the Infiniti Defendants are bound by the Stipulation of Settlement signed by their attorneys. It is well settled that "[s]tipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of open court stipulations [ ]. ... 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”. *Hallock v State of New York*, 64 NY2d 224, 230 (1984)(internal quotations and citations omitted). Here, the Infiniti Defendants do not even allege fraud, collusion, mistake or accident such that the Stipulation of Settlement is valid.

In support of their order to show cause, the Infiniti Defendants argue that they cannot be bound by the Stipulation of Settlement as they did not participate in the negotiations, and did not authorize the settlement. The Court of Appeals, in *Hallock*, held that “[f]rom the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions.” *Id.* The Court of Appeals further held that “[a] stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.” *Id.* at 228. Here, plaintiff commenced this action in 2013. Thereafter, the Infiniti Defendants filed an answer by their attorneys Cartafalsa, Slattery, Turpin & Lenoff dated January 7, 2014. Subsequently, a Notice of Appearance of Trial Counsel, dated November 13, 2015, was filed and served by Lester Schwab Katz & Dwyer, LLP for the Infiniti Defendants. Dated that same day, a Notice of Association of Counsel was filed by Fabiani Cohen & Hall, LLP as co-counsel to Cartafalsa, Slattery, Turpin & Lenoff for the Infiniti Defendants. It is clear from the Stipulation of Settlement that such agreement was entered into on behalf of the Infiniti Defendants by their attorneys of record. A quick review of the Stipulation of Settlement reveals that it was signed by both Fabiani Cohen & Hall, LLP and Lester Schwab Katz & Dwyer, LLP. Noticeably absent from the Infiniti Defendants papers is any contract between them and Tower Insurance or Great American which demonstrates that Tower Insurance or Great American did not have the authority to hire an attorney on behalf of the Infiniti Defendants and to enter into a settlement

agreement. Notably, the Infiniti Defendants' papers are devoid of any affidavit from someone with personal knowledge stating that they had no knowledge of the settlement and did not authorize such. Rather, the only supporting affirmation is from a member of the law firm of Lester Schwab Katz & Dwyer, LLP, the same firm that the Infiniti Defendants are now claiming did not have authority to enter into the Stipulation of Settlement on their behalf. Here, since January 2014, the Infiniti Defendants either personally, or through their insurance, hired several attorneys to represent them in this action and, for over 2 and a half years, the Infiniti Defendants did not personally appear in any of the 11 appearances in this action to defend the case or state that such attorneys did not represent them. Instead, the Infiniti Defendants let such attorneys appear on their behalf on numerous conferences with the court, and never objected to the Stipulation of Settlement until the filing of the instant Order to Show Cause, over a year and 6 months after the Stipulation of Settlement was signed in open court and so ordered by Justice Silver. Here, as in *Hallock*, the Infiniti Defendants "clothed [their attorneys] with apparent authority to enter into the settlement. [The attorneys] had represented [the Infiniti Defendants] through the litigation, engaged in prior settlement negotiations for them and, in furtherance of the authority which had been vested in [them], appeared at [the fifth judicial mediation, their] presence there constituting an implied representation by [the Infiniti Defendants] to [the other parties] that [the attorneys] had authority to bind [them] to the settlement." *Id.* at 231-232. Thus, the order to show cause by defendants Infiniti of Manhattan, Inc. and Massamba Seck is denied.

Accordingly, it is

ORDERED that defendants Infiniti of Manhattan, Inc. and Massamba Seck's order to show cause is denied; and it is further

ORDERED that within 30 days, plaintiff shall serve a copy of this Decision/Order on the



County Clerk who shall amend the judgment entered against defendants Infiniti of Manhattan, Inc. and Massamba Seck to reflect a judgment in the amount of \$4,000,000.00; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

Dated: June 1, 2018

ENTER:



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Hon. Adam Silvera, J.S.C.