Diarra v James A Leasing Inc
2018 NY Slip Op 32784(U)
October 29, 2018
Supreme Court, New York County
Docket Number: 152445/2013
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

Justice

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MOHAMED DIARRA,

Plaintiff,

- v -

JAMES A LEASING INC and ALPHA JURIA,

Defendants.

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INDEX NO. 152445/2013

MOTION DATE 09/12/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40

were read on this motion to/for RESTORE TO TRIAL CALENDAR.

Motion by Plaintiff Mohamed Diarra ("Diarra") to restore this action to the trial calendar is denied.

BACKGROUND

Plaintiff commenced the instant action on March 18, 2013, by e-filing a summons and complaint. The complaint alleged, in sum and substance, that Plaintiff sustained injuries, on or about May 10, 2012, due to the negligence of Defendants while riding a bicycle that collided with a motor vehicle owned by defendant James A. Leasing, Inc. and operated by defendant Alpha Juria. The matter was assigned to the Hon. Arlene P. Bluth, J.S.C., and, after discovery proceeded in the normal course, on July 27, 2015, Plaintiff filed the certificate of readiness and note of issue. Then, on or about, September 11, 2017, the matter was sent to the Trial Ready Part for jury selection.

After the jury had been selected, on September 25, 2017, the parties appeared before this Court, which was assigned the matter for trial. Prior to the commencement of the jury trial, at a conference with the Court, the parties settled for $67,500.00. The settlement and its terms were placed on the record in open court and the part clerk marked the matter settled and disposed.

On September 12, 2018, Plaintiff filed the instant motion before this Court for an order restoring this case to the trial calendar and setting the matter down for a date certain for trial. Plaintiff argues, in sum and substance, that Diarra changed his mind after the matter was settled in open court and wishes to proceed to trial. Plaintiff argues that Diarra had been informed of Defendants' settlement offer of $67,500.00 and had given his counsel verbal permission to accept the offer. Plaintiff then argues that, on September 25, 2017, Diarra's counsel "appeared in Court on his behalf and informed the Court of the acceptance of [D]efendant[s'] offer." (Affirmation of Parra ¶ 7.) Plaintiff then argues that, on September 26, 2017, Diarra appeared at his counsel's law offices and "signed the appropriate releases." (*Id.* ¶ 8.) Plaintiff then argues

that, later that day, Diarra called his counsel's law office and left a voicemail "advising [] that he *changed his mind* and would no longer accept the settlement." (*Id.* ¶ 9 [emphasis added].)

Plaintiff in support of his application submits an affidavit by Diarra dated August 17, 2018, in which he states as follows:

> "Prior to the start of my trial, my attorneys informed me that the defendants had made a settlement offer of $67,500 and I gave her [sic] verbal permission to accept that amount. On September 25, 2017, Candice Pluchino, Esq. appeared in Court on my behalf and *informed the Court of my acceptance of the offer*.
>
> "On September 26, 2017 I appeared at my attorney's firm in order to sign the releases *which I did*. Later that day I left a voicemail for my attorneys that I had *changed my mind* about the settlement and not to mail the signed releases to defendant's firm. I believed that I should be awarded more money due to having undergone 2 surgeries and I was still experiencing pain in my left knee and ankle."

(Aff of Diarra at 1.) Diarra then indicates that he appeared before the Hon. George Silver, J.S.C. on April 3, 2018, to discuss the settlement and that he "still refused to accept the settlement offer." (*Id.* at 2.) Diarra then states that "[t]his affidavit has been translated to me from English to Mandingo and I understand what it says and swear that the contents of this affidavit are true and correct." (*Id.*)

Defendants argue in opposition, in sum and substance, that the parties entered into a stipulation of settlement in open court which is binding on all parties and which is final. Defendants argue that there is no fraud, collusion, mistake, or accident alleged by Plaintiff that would invalidate the binding contract between the parties, which was agreed upon by stipulation of all parties in open court. Defendants further argue that Plaintiff's attorney represented at the time of the settlement that Diarra had been spoken with at length and had given his consent to settle the matter through his attorney, Ms. Pluchino.

Plaintiff indicates in its reply papers that he "does not dispute defendant's version of events" that "there was no fraud, collusion, mistake or accident and that the on-the-record stipulation between all parties accepting the settlement is binding." (Reply affirmation of Parra at 1.) Plaintiff then reiterates his position that he would not allow his attorneys to forward the signed release to Defendants.

DISCUSSION

CPLR 2104 provides that "[a]n 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." As the Court of Appeals has stated,

> "[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 within CPLR 2104, where 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. 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*, 64 NY2d 224, 230 [1984] [citations omitted].)

Similarly, the Appellate Division, First Department had recently stated,

> "Generally speaking, stipulations of settlement will not be set aside absent a showing of such good cause as would invalidate a contract. In the circumstances found, we read 'set aside' to mean 'will not be departed from'. There was no dissent from any of the stipulation's provisions when it was formed in the courtroom, and it should stand as written. The stipulation of settlement, which was definite and complete upon its face, and spread upon the record in open court, constituted a valid and binding contract between plaintiff and the other parties to it. Equity 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."

(*Term Indus., Inc. v Essbee Estates, Inc.*, 88 AD2d 823, 824–825 [1st Dept 1982] [citations and emendations omitted].) The court found that, in a case where a party to the settlement agreement had consented to the agreement in open court but had subsequently "refused to sign any papers" or carry out the material terms of the agreement in the hope of securing more favorable terms from her adversary, "there [was] nothing found here whatever of fraud, overreaching, mistake, or any other good cause—nothing but afterthought and change of mind." (*Id.*) The court held that a change of mind was an insufficient basis for abrogating the stipulation of settlement. (*See also Harrison v NYU Downtown Hosp.*, 117 AD3d 479 [1st Dept 2014].)

Moreover, even where an attorney merely held apparent, not actual, authority to consent to a settlement agreement in open court on behalf of her client, it was error for a lower court to vacate a stipulation of settlement in equity. (*See Daniels v Concourse Animal Hosp.*, 41 AD3d 284 [1st Dept 2007]; *Clark v Bristol-Myers Squibb and Co.*, 306 AD2d 82 [1st Dept 2003]; *see also Massie v Crawford*, 289 AD2d 66, 66 [1st Dept 2001].)

Here, there is no dispute that Diarra consented to the settlement in open court and that Ms. Pluchino had both apparent and actual authority to communicate that consent. The Court finds that Diarra's mere change of mind and refusal to permit his attorneys to mail his signed releases to Defendants is an insufficient basis for restoring the action to the trial ready calendar. The matter settled on September 25, 2017, upon the binding material terms of a stipulation of settlement entered into by the parties, before this Court, in open court. It will be for the parties to chart their own course regarding this matter and any mutually agreed-upon change in the terms of the agreement or any enforcement sought by Defendants. As of now, the litigation is at an end.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Mohamed Diarra ("Diarra") to restore this action to the trial calendar is denied.

The foregoing constitutes the decision and order of the Court.

10/29/2018
DATE

HON. ROBERT D. KALISH

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE