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| <b>Etheridge v Troia</b>   |
| 2018 NY Slip Op 33403(U)   |
| November 27, 2018  |
| Supreme Court, Richmond County   |
| Docket Number: 151037/18   |
| Judge: Wayne M. Ozzi   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

NABRE ETHERIDGE,

Hon. Wayne M. Ozzi

Plaintiff,

DECISION AND ORDER  
151037/18

-against-

SAMANTHA TROIA and ROBERT CAMPBELL,

Mot. Seq. 001,002

Defendants.

The following papers were marked fully submitted on September 15, 2018.

|  | Papers<br>Numbered |
|--|--------------------|
| Defendant's Notice of Motion and Affirmation in Support of<br>Motion to Dismiss with Exhibits Annexed<br>(dated June 1, 2018)..... | 1                  |
| Plaintiffs Affirmation in Opposition with Exhibits Annexed<br>(dated July 28, 2018).....   | 2                  |
| Defendant's Reply with Exhibits Annexed<br>(dated August 1, 2018).....   | 3                  |

Defendant Samantha Troia moves for an Order pursuant to CPLR 3211(a)(5) and General Obligations Law 15-108 to dismiss the underlying action with prejudice because plaintiff had previously accepted a settlement and discharged defendant Troia from any and all claims by signing a fully executed release with defendant Troia. Plaintiff opposes the motion, arguing mistake of fact as well as fraudulent inducement. After a review of all papers submitted the defendant's motion is denied for the reasons set forth below:

This action has its genesis in a motor vehicle accident that occurred on April 9, 2017 at approximately 2:00 p.m. at the intersection of Little Clove Road and Northern Boulevard in Staten Island, New York. The plaintiff was a passenger in a vehicle operated by Samantha Troia that was involved in an accident with the vehicle being driven by defendant Campbell.

As a result of the accident, the plaintiff allegedly sustained serious personal injuries including a large labral tear, significant symptoms for a left labral tear; left knee patella latah and left shoulder impingement. As a result of these injuries, on May 25, 2017, plaintiff underwent a left hip arthroscopy with labral debridement and synovectomy.

On April 18, 2017, nine days after the accident, and prior to surgery, an insurance representative, one James Friscia, from Progressive Insurance Company on behalf of defendant Troia, arrived at plaintiff's home and took pictures of the abrasions and lacerations to her left knee and left shin. Plaintiff alleges that the representative told her that the highest settlement she could obtain was \$1,500.00, and also advised her that the "the other passengers in her vehicle were paid to settle their claim(s)" (See, Exhibit A, attached to plaintiff's Opposition, Affidavit of Nabre Etheridge).

That same day, plaintiff signed and dated a Full Release of All Claims and Demands that read in relevant part as follows:

"...It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries and damages, and that neither this release, nor the payment pursuant thereto, shall be construed as an admission of liability, such being denied.

It is further understood and agreed that the undersigned relies wholly upon the undersigned's judgment, belief and knowledge of the nature, extent, effect and duration of said injuries and liability therefore is made without reliance upon any statement or representation of the party or parties hereby released or their representatives.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT." (Defendant's Exhibit B).

Plaintiff states in her affidavit that at the time she met with the insurance representative she believed she was being offered compensation for her initial out of pocket expenses, and did not know that was this intended by the representative as a full settlement of her bodily injury claim. In addition, plaintiff alleges that at the time she signed the release, she did not know the full extent of her injuries and executed the release without the advice of counsel. In support of these contentions, plaintiff submits two MRI reports, one of plaintiff's left hip and the other of her left knee that were not performed until April 25, 2017, seven days after she signed the release. The MRI of the left hip revealed an anterior superior labral tear. The MRI of the left knee revealed a patella alta with lateral subluxation, degenerative change and joint effusion.

(Affirmation in Opposition of Plaintiff's Counsel dated July 28, 2018, Exhibits B & C). After the MRI of her hip on May 25, 2017, plaintiff underwent a left hip arthroscopic procedure with labral debridement and synovectomy (Plaintiff's Affidavit dated July 26, 2018, attached as Exhibit A to Counsel's Affirmation in Opposition).

"A release is a contract, and its construction is governed by contract law." (*Cardinal Holdings, Ltd. v. Indotronix Int'l Corp.*, 73 AD3d 960, 962 [2d Dept 2010], quoting *Lee v. Boro Realty, LLC*, 39 AD3d 715, 716 [2d Dept 2007]; see *Rivera v. Wyckoff Hgts. Med. Ctr.*, 113 AD3d 667, 670 [2d Dept 2014]). In general, "a valid release constitutes a complete bar to an action on a claim which is the subject of the

release” (*Centro Empresarial Cempresa S.A. v. America Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]. “A release may be invalidated, however, for any of ‘the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake’.” (*id.* at 276, quoting *Mangini v. McClurg*, 24 NY2d 556, 563 [1969].

Moreover, there is a requirement that a release covering both known and unknown injuries be “‘fairly and knowingly made’” (*Id.*, at 566, quoting *Farrington v. Harlem Sav. Bank*, 280 NY 1, 4, [1939]; *Powell v. Adler*, 128 AD3d 1039 [2d Dept 2015]; *Pacheco v 32-42 55th St. Realty, LLC*, 139 AD3d 833, 833-34 [2d Dept 2016].

Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting a copy of the release signed by the plaintiff, which by its language released the defendants from any and all claims or actions arising from the accident. In their reply, defendants also attached the affidavit of the claims adjuster, James Friscia, who visited the plaintiff at her home on April 18, 2017 to investigate the claim. According to his affidavit, the claims adjuster states that before he spoke with the plaintiff, he asked if she had an attorney to which she replied that she did not. The adjuster also stated that during “settlement negotiations” that \$1,500.00 was being offered in full settlement of her claim. The adjuster also states that plaintiff was reluctant to accept the settlement funds as the defendant, Ms. Troia, was a friend and she did not want to cause her any trouble. The adjuster alleges that he explained to Ms. Etheridge that in accepting the settlement funds she would not cause her friend any hardship. The plaintiff then “voluntarily” signed the release. Mr. Friscia alleges that at no time did Ms. Etheridge claim that she did not understand the terms of the release, nor did she claim

that she did not know or understand the severity of her injuries, as she was aware that she had an upcoming physical therapy appointment for her left knee and hip as well as an MRI of her left hip and knee. (Defendant's reply, Exhibit A). In addition, the plaintiff accepted and cashed a check in the amount of \$1,500.00 from Progressive (Defendant's Exhibit C; see *Matter of Singer v. Windfield*, 125 AD3d 666 [2d Dept 2015]; *Schiller v. Guthrie*, 102 AD3d 854 [2d Dept 2013]).

In opposition, however, the plaintiff raised a triable issue of fact. While not dispositive, plaintiff's affidavit states that the insurance adjuster visited her only nine days after the accident, when she could not have possibly known the extent of her injuries, because the MRI of her knee and hip were scheduled for the following week. The allegations that the adjuster told her the highest settlement she could obtain was \$1,500.00 and that all of the other passengers in the car had settled their claims, if true, raise triable issues of fact as to whether, inter alia, there was fraud in the inducement of the release, and as to whether the release was fairly and knowingly made (see, *Sacchetti-Virga v. Bonilla*, 158 AD3d 783 [2d Dept 2018]; *Warmhold v. Zagarino*, 106 AD3d 994 [2d Dept 2013]; *Fuentes v. Aluskewicz*, 25 AD3d 727 [2d 2006]). This is especially true where the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances (see, *Mangini v. McClurg*, *supra*, at 567). Here, the allegations of fraud were sufficient to support a possible finding that the release, signed by the plaintiff, was obtained "under circumstances which indicate unfairness" (*Farber v Breslin*, 47 AD3d 873, 877 [2d Dept 2008] quoting, *Gibli v. Kadosh*, 279 A.D.2d 35, 41 [1st Dept 2000]), and/or unconscionability (*Rivera v. Vickers*, 72 AD2d 807 [2d Dept. 1979]; see also, *Castenada v. Ruderman*, 48 Misc. 2d 321).

The Court notes at this point that there is no evidence in the record before it supporting the adjuster's representations that the other passengers had in fact settled their claims with defendant.

Finally, it must be remembered that where fraud or duress or the like in procuring a release are alleged, a motion to dismiss such release should be denied (*Bloss v. Va'ad Harabonim of Riverdale*, 203 AD2d 36 [1<sup>st</sup> Dept. 1994], citing, inter alia, *Newin Corp. v. Hartford Acc. & Indem. Co.*, 37 NY2d 211, 217 [1975]; *Anger v. Ford Motor Co. Dealer Dev.*, 80 AD2d 736 [4<sup>th</sup> Dept.. 1981].

Defendant's ninth affirmative defense, that of release, shall be an issue to be determined at trial.

For the foregoing reasons, defendants' motion to dismiss (Motion Seq. 001) is denied.

The motion for a joint trial (Motion Seq. 002) is granted pursuant to the terms of the order dated February 22, 2018 under Index # 152268/2017.

It is so ordered.

ENTER 

Dated:  
November 27, 2018

HON. WAYNE M. OZZI  
J.S.C.