New York City Sch. Constr. Auth. v Ennead Architects, LLP
2019 NY Slip Op 32323(U)
July 29, 2019
Supreme Court, New York County
Docket Number: 450572/15
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 52

NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Plaintiff,

- against -

ENNEAD ARCHITECTS, LLP,

Defendant.

Index No.: 450572/15

DECISION AND ORDER

Motion sequence no. 002

ALEXANDER M. TISCH, J.:

In this action, plaintiff New York City School Construction Authority (SCA) sues defendant Ennead Architects, LLP (Ennead) for breach of contract and malpractice in connection with the design and construction of a public school, the Frank Sinatra School of the Arts High School (the Frank Sinatra HS or the school), in Queens County, New York. Ennead moves, pursuant to CPLR 3211 (a) (1), or alternatively pursuant to CPLR 3212, to dismiss the complaint based on a release in a separate personal injury action against SCA and Ennead as a third-party defendant. SCA cross-moves, pursuant to CPLR 3211 (b), to dismiss Ennead's affirmative defense of payment and release.

Background

SCA commenced this action in February 2015, alleging that it contracted with Ennead to design and provide construction support services for the Frank Sinatra HS and Ennead failed to perform its duties in accordance with its contractual obligations and generally accepted professional standards. Complaint, NYSCEF Doc. No. 1, ¶ 2. The Complaint alleges that, in November 2000, SCA entered into a contract with Ennead "for design and consulting services for the construction of New York City public schools, including the preparation of feasability studies, design-build/design documents, and full architectural and engineering design documents" (*id.*, ¶ 7); that Ennead began its work for the Frank Sinatra HS in or about October 2003, and continued performing work at the school through at least May

2013 (*id.*, ¶¶ 15, 16); and that Ennead failed to provide a complete and appropriate design prior to bidding for and commencement of construction of the school, resulting in hundreds of modifications and/or additions to the design documents and significant expenses for SCA above the contract bid price. *Id.*, ¶¶ 19-22. Thus, SCA alleges, Ennead, by reason of its deficient design, failed to perform under the terms of the contract, and committed architectural malpractice by failing to use reasonable and customary care, departing from accepted practice, and failing to perform services in accordance with professional standards.

Prior to the commencement of this action, in or around November 2013, Donald Graham (Graham) brought a personal injury action, arising from a trip and fall on an exterior passageway and handicap ramp in front of the Frank Sinatra HS, against SCA, the City of New York (City), and the New York City Department of Education (DOE), alleging negligence in the design, construction, ownership and maintenance of the passageway and ramp (the personal injury action). *See* Graham Complaint, NYSCEF Doc. No. 67. SCA, the City and the DOE brought a third-party action against Ennead for contribution, indemnity, and insurance, alleging that Ennead's negligence in connection with the design and construction of the exterior passageway and handicap ramp caused or contributed to Graham's injuries. *see* Third-Party Complaint, NYSCEF Doc. No. 69. The personal injury case was settled after a mediation before a National Arbitration and Mediation (NAM) hearing officer, and a settlement agreement (NAM Agreement) was signed by the parties on April 7, 2017. *See* Post Mediation Agreement, NYSCEF Doc. No. 58 (sealed). The NAM Agreement provided the amounts to be paid to Graham by defendants and third-party defendant, and stated that "[e]ach party releases the other from any and all claims and/or liability arising from this matter." It also indicated that plaintiff and defendants were "to execute [defendants' and third-party defendant's] closing documents," to be provided to plaintiff's and defendants' counsel within five days.

A Settlement Agreement (Agreement) then was drafted and signed by all the parties and their insurance companies, apparently on various dates in May 2017 and February, March and April 2018. *See* Agreement, NYSCEF Doc. No. 60 (sealed). Noting that Graham had asserted "claims for negligence in the design, construction, maintenance and operation of the Frank Sinatra High School," and that, "pursuant to a contract with SCA, Ennead performed certain architectural services related to the design of the Frank Sinatra High School," the Agreement stated that the parties have agreed to settle their disputes regarding "the Accident, the Frank Sinatra High School, and/or the Litigation." The Agreement defined the "Accident" as Graham's trip and fall, the Frank Sinatra High School as "the building and premises known as the Frank Sinatra School of the Arts, located at 35-12 35th Avenue," and the "Litigation" as the Complaint and Third-Party Complaint. The Agreement further stated that "Graham, the City Entities, SCA, Liberty Mutual, Ennead, and Travelers have agreed to waive, discharge, release and forego any and all claims relating to the Accident, the Frank Sinatra High School, and/or the Litigation." A stipulation discontinuing the claims and third-party claims in the personal injury action was subsequently signed and filed.

As pertinent here, paragraph 6 (a) of the Agreement, pertaining to the "Mutual Release by the City Entities, SCA and Ennead," provided that:

> "Subject to the receipt of the fully executed Agreement and exhibits attached thereto, the City Entities, SCA and Liberty Mutual do hereby . . . unconditionally and irrevocably release, acquit, and discharge Ennead and Travelers . . . from any and all . . . actions, . . . claims, . . . causes of action, . . . liability, . . . suits, . . . whether known or unknown, that City Entities Releasors have or may have had or may have in the future against the Ennead Releasees, any of them, based upon the Accident, the Frank Sinatra High School, and/or the Litigation from the beginning of time to the date of this Agreement."

In support of its motion to dismiss,[1] Ennead argues that the above language in paragraph 6 (a) of the Agreement clearly shows that SCA released all claims against Ennead in the instant action. In opposition and in support of its cross motion, SCA argues that the Agreement was not properly executed by the City and DOE and therefore, there was no release. Additionally, the release was intended to apply only to the claims arising out of the personal injury action.

Discussion

"Generally, '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 América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 (2011) (citations omitted). "Where the language is clear and unambiguous, the release is binding on the parties unless it is shown that it was procured by fraud, duress, overreaching, illegality or mutual mistake." *Allen v Riese Organization, Inc.*, 106 AD3d 514, 516 (1st Dept 2013); *see Centro Empresarial Cempresa S.A.*, 17 NY3d at 276; *Global Precast, Inc. v Stonewall Contracting Corp.*, 78 AD3d 432, 432 (1st Dept 2010). "A valid general release will apply not only to known claims, but 'may encompass unknown claims, . . . if the parties so intend and the agreement is "fairly and knowingly made." ' " *Rivera v Wyckoff Hgts. Med. Ctr.*, 113 AD3d 667, 670-671 (2d Dept 2014), quoting *Centro Empresarial Cempresa S.A.*, 17 NY3d at 276 (other citations omitted); *see Matter of Mercer*, 141 AD3d 594, 597 (2d Dept 2016). "Nevertheless, '[t]he meaning and coverage of a general release depends on the controversy being settled and upon the purpose for which the release was actually given, and a general release may not be read to cover matters which the parties did not desire or intend to dispose of.'" *Rivera*, 113 AD3d at 670 (citations omitted); *see Cahill v Regan*, 5 NY2d 292, 299 (1959);

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[1] Ennead previously moved to dismiss the complaint based on the three-year statute of limitations for architectural malpractice, arguing that its work was completed by the end of 2009. The trial court granted Ennead's motion, but the Appellate Division, First Department, by decision dated March 28, 2017, reversed and reinstated the complaint.

Mazzurco v PII Sam, LLC, 153 AD3d 1341, 1342 (2d Dept 2017); *Alkholi v Macklowe*, 2017 WL 6804076, *6, 2017 US Dist LEXIS 211700, *14 (SD NY 2017). "'In order to be entitled to dismissal of an action based upon a release, the movant must show that the release was intended to cover the subject action or claim.'" *Mazzurco*, 153 AD3d at 1342 (citation omitted).

"'[A] release is governed by principles of contract law,' and a release 'that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms.'" *Inter-Reco. Inc. v Lake Park 175 Froehlich Farm, LLC*, 106 AD3d 955, 955 (2d Dept 2013), quoting *Mangini v McClurg*, 24 NY2d 556, 562 (1969) and *Alvarez v Amicucci*, 82 AD3d 687, 688 (2d Dept 2011) (other citations omitted); *see Miller v Brunner*, 164 AD3d 1228, 1231 (2d Dept 2018); *Sacchetti-Virga v Bonilla*, 158 AD3d 783, 783 (2d Dept 2018); *Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 429 (1st Dept 2011).

"Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990); *see Goldman Sachs Group, Inc. v Almah, LLC*, 85 AD3d 424, 426 (1st Dept 2011). "'[A] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations.'" *Almah LLV v AIG Empl. Servs., Inc.*, 157 AD3d 416, 416 (1st Dept 2018) (citation omitted); *see Greenfield v Philles Records*, 98 NY2d 562, 570 (2002); *Goldman Sachs Group, Inc.* 85 AD3d at 426 . "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is 'susceptible of two reasonable interpretations.'" *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014). "[L]anguage in a contract will be deemed unambiguous only if it has ' "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." ' " *Johnson*, 84 AD3d at 429, quoting *Greenfield*, 98 NY2d at 569, quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 (1978).

As courts have explained, because "'releases contain standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled . . . . the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form.'" *Johnson*, 84 AD3d at 429, quoting *Mangini*, 24 NY2d at 562. "[W]hen the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course of dealings, evinces that the parties' intentions were not reflected in the general terms of the release, the release does not conclusively establish a defense as a matter of law." *International Asbestos Removal v Beys Specialty, Inc.*, 135 AD3d 486, 486 (1st Dept 2016).

On a CPLR 3211 (a) (1) motion to dismiss, the moving party may prevail "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001); *Leon v Martinez*, 84 NY2d 83, 88 (2002). "The documents submitted must be explicit and unambiguous." *Dixon v 105 W. 75th St., LLC*, 148 AD3d 623, 626 (1st Dept 2017); *see Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849 (2d Dept 2012). Affidavits submitted by defendants on a motion to dismiss, while permissible "for authenticating and submitting relevant documentary evidence" (*Muhlhahn v Goldman*, 93 AD3d 418, 418 [1st Dept 2012]), "will almost never warrant dismissal under CPLR 3211 *unless* they 'establish conclusively that [petitioner] has no [claim or] cause of action.'" *Lawrence v Miller*, 11 NY3d 588, 595 (2008) (emphasis in original), quoting *Rovello v Orfino Realty Co.*, 40 NY2d 633, 636 (1976); *see also Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc*, 115 AD3d 128, 134 n 4 (1st Dept 2014).

Likewise, on a motion for summary judgment under CPLR 3212, the evidence must be viewed in

a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, "or where the issue is 'arguable.'" *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (citations omitted); *see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). As is often reiterated, "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations." *Vega v Restani Corp.*, 18 NY3d 499, 505 (2012), citing *Sillman*, 3 NY2d at 404. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013), quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986); *see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 (1st Dept 2002).

Here, defendant Ennead has not demonstrated that the document on which its motion is based conclusively establishes as a matter of law that it has been released from all claims in this action. Read in the context and circumstances of the settlement of the Graham personal injury action, the release of all claims arising from "the Accident, the Frank Sinatra High School, and/or the Litigation" does not unambiguously demonstrate that the intent of the parties was to extend the release to claims beyond those arising out of the personal injury action.

The intent of the parties in settling the Graham personal injury action, as expressed in both the NAM agreement and the Agreement, was to resolve the disputes, claims and issues arising from the personal injury action and settle their disputes regarding "the Accident, the Frank Sinatra High School, and/or the Litigation." Although Ennead's attorney asserts that it was Ennead's position during mediation in the personal injury action that it would agree to settle the personal injury action on the condition that the parties entered into a comprehensive settlement agreement (Chimos Aff., NYSCEF Doc. No. 54, ¶ 14), there is no indication of that in the Agreement. Additionally, the attorney who

represented SCA, the City and DOE in the personal injury action asserts that the instant action was not mentioned during the mediation, she had no knowledge at that time of this action, and it was her understanding that the claims being settled were limited to those arising from Graham's trip and fall on the ramp outside the Frank Sinatra HS. *See* Affirmation of Susan Smodish, NYSCEF Doc. No. 76. SCA also submits an affidavit from its then Executive Vice President and General Counsel, who attests that, by executing the Agreement, he intended only to release claims relating to the personal injury action. *See* Affirmation of Ross Holden, NYSCEF Doc. No. 74. In furtherance of the settlement, SCA, the City and DOE paid Graham a sum of money, and Ennead paid Graham a sum of money. No money was paid by Ennead to SCA.

Thus, on the record before the Court, "considering the conflicting rational interpretations of . . . [the release] advanced by the parties in support of and in opposition to the motion" (*Hall Enters., Inc. v Liberty Mgt. & Constr. Ltd.*, 37 AD3d 658, 659 [2d Dept 2007]), factual issues exist regarding the intended scope of the subject release, and "it cannot definitively be determined at this juncture whether the release was intended to cover the plaintiff's present claims." *Kaprall v WE: Women's Entertainment, LLC*, 74 AD3d 1151, 1152 (2d Dept 2010); *see Matter of Brown*, 65 AD3d 1140 (2d Dept 2009); *Apfel v Prestia*, 41 AD3d 520 (2d Dept 2007). For similar reasons, SCA's cross motion to dismiss the affirmative defense of release is denied. SCA's argument that the release is unenforceable against it because the Agreement was not properly executed by the City and DOE is unsupported by legal authority and is otherwise unavailing.

Accordingly it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff's cross motion to dismiss the eleventh affirmative defense is denied.

Dated: July 29, 2019

ENTER:

ALEXANDER M. TISCH, J.S.C.