**Dilone v Sunshine Capital LLC**

2020 NY Slip Op 32531(U)

July 31, 2020

Supreme Court, New York County

Docket Number: 151099/2019

Judge: W. Franc Perry

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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

***Justice***

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JUSTINA DILONE,

Plaintiff,

- v -

SUNSHINE CAPITAL LLC, EAST COAST MANAGEMENT LLC

Defendant.

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**INDEX NO.** 151099/2019

**MOTION DATE** 01/16/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

In this personal injury action, defendants Sunshine Capital LLC and East Coast Management LLC, ("defendants"), seek an order pursuant to CPLR 3025(b), granting defendants leave to amend their answer to assert the affirmative defense of waiver and release; deeming the amended answer served and upon amendment of the answer, pursuant to CPLR 3211(a)(1), 3211(a)(5), and/or 3212 dismissing plaintiff s complaint in its entirety. Plaintiff's oppose the motion.

**BACKGROUND/CONTENTIONS**

Plaintiff commenced this negligence action on January 31, 2019 against defendants, the owner and manager of a building in which she leased a rent stabilized residential apartment, seeking to recover for injuries allegedly sustained from a trip and fall on broken flooring in her apartment on December 28, 2018. (NYSCEF Doc. Nos. 14, 16). Defendants appeared in this

action and answered the complaint on April 5, 2019. (NYSCEF Doc. No. 15). Plaintiff alleges that she sustained personal injuries including a fractured left hip which required surgery and a convalescent period in two rehabilitation facilities for several months following her surgery; Isabella Geriatric Center followed by Methodist Home for Nursing and Rehabilitation. (NYSCEF Doc. No. 16, ¶¶10-14; Doc. No. 25, ¶¶4-6).

In opposition to defendants' motion, plaintiff submits an affidavit, translated from her native Spanish language, wherein she claims that she retained her personal injury attorney, David Resnick and Associates, "to commence the instant litigation, and to represent all my interests stemming from my injury." (NYSCEF Doc. No. 25, ¶5). She further states that following her release from Methodist Home and Rehabilitation, on March 14, 2019 she moved into her son's apartment located in Philadelphia, Pennsylvania. (NYSCEF Doc. No. 25, ¶7). Plaintiff contends that during this time, her son informed her that he had asked her landlord whether they could receive compensation in exchange for his mother vacating the apartment located at 621 West 171st Street and that he had retained Mr. Ian Brandt, a landlord tenant attorney he located through an internet search, to assist in negotiating an agreement with the landlord. (Id. at ¶¶8, 9).

Plaintiff maintains that "approximately six weeks after Mr. Brandt was retained, Freddy informed me that the landlord was willing to offer fifty thousand dollars ($50,000) in exchange for my surrender of the apartment by no later than May 31, 2019." (NYSCEF Doc. No. 25, ¶10). Thereafter, on May 17, 2019, in exchange for $50,000, plaintiff executed a Surrender and Termination Agreement in which she surrendered the apartment and released all claims "in any way connected to the Lease" for her apartment, where she claims her accident occurred, including any and all claims based in whole or in part on the negligence of the Landlord

Released Party. (NYSCEF Doc. No. 16, ¶¶3-6; NYSCEF Doc. No. 18, preamble and ¶¶4(d) and 5; NYSCEF Doc. No. 19).

Defendants now seek to amend the answer to assert the affirmative defense of waiver and release, relying on the language of the Surrender Agreement and specifically, paragraph 5, which they contend sets forth explicitly and triply highlighted in bold, italics, and all-caps, language that releases the defendants for all claims, including any claims arising out of the defendants' negligence. Paragraph 5 of the Surrender Agreement provides:

> Release. Upon the termination of the Lease as set forth above, Tenant (for himself and any other party that may claim through or under Tenant) agrees that without further acts, Landlord together with Landlord=s[sic] employees, agents, representatives, asset manager, consultants, attorneys, fiduciaries, servants, officers, directors, partners, predecessors, successors and assigns (collectively, the "Landlord Released Parties"), shall be released and forever discharged from any and all actions, causes or action, judgments, executions, suits, investigations, debts, claims, demands, liabilities, obligations, damages and expenses of any and every character that arise out of or in any way are connected to the Lease, or any of the transactions associated therewith (collectively, the "Released Matters), including, without limitation, all Released Matters that are known or unknown, direct and/or indirect, existing at law or in equity, of whatsoever kind or nature, whether heretofore or hereafter accruing, for or because of any matter or thing done, omitted, or suffered to be done by any of the Landlord Released Parties prior to and including the date of actual execution of this Agreement by Landlord and Tenant, ***INCLUDING ANY AND ALL CIAIMS BASED IN WHOLE OR IN PART ON THE NEGLIGENCE OR STRICT LIABILITY OF SUCH LANDLORD RELEASED PARTY***. Tenant acknowledges and agrees that this release shall be governed by the laws of the State of New York. (NYSCEF Doc. No. 19, ¶5).

In opposing defendants' motion, plaintiff maintains that she was never made aware that by signing the Surrender Agreement and accepting payment of $50,000 from her landlord, she would also be releasing any all claims arising out of the alleged trip and fall in her apartment. In addition to plaintiff's translated affidavit, she also submits the affidavits of her son and her landlord tenant attorney, who negotiated the terms of her surrender, which affidavits provide that

none of the parties involved in the transaction culminating in the execution of the Surrender and Termination Agreement, intended the document to result in waiving and releasing plaintiff's negligence claims as set forth in the complaint herein. (NYSCEF Doc. Nos. 26, 27).

In support of dismissal, defendants rely on the plain language of the release and established case law which they contend requires the court to permit the answer to be amended to assert the affirmative defense of waiver and release and upon amendment, dismiss the complaint as barred by the documentary evidence. In opposition, plaintiff maintains that defendants should not be granted leave to amend the answer and should leave be granted, the defendants' motion must be denied because, even though plaintiff was represented by counsel in negotiating and executing the Surrender and Termination Agreement, the release should not operate to bar the instant claims as it was not entered into fairly and knowingly.

**STANDARD OF REVIEW/ANALYSIS**

"It is well established that leave to amend a pleading [pursuant to CPLR 3025 (b)] is freely given 'absent prejudice or surprise resulting directly from the delay' " (*Anoun v City of New York,* 85 AD3d 694, 694, 926 NYS2d 98 [1st Dept 2011], quoting *Fahey v County of Ontario,* 44 NY2d 934, 935, 380 NE2d 146, 408 NYS2d 314 [1978]). "A party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment]' " (McGhee v Odell, 96 AD3d 449, 450, 946 NYS2d 134 [1st Dept 2012], quoting *Otis El. Co. v 1166 Ave. of Ams. Condominium,* 166 AD2d 307, 564 NYS2d 119 [1990]). "Prejudice arises when a party incurs a change in position, or is hindered in the preparation of its case, or has been prevented from taking some measure in support of its position" (*Valdes v Marbrose Realty*, 289 AD2d 28, 29, 734 NYS2d 24 [1st Dept 2001]).

Here, granting defendants leave to amend the answer to assert the affirmative defense of waiver and release will not prejudice plaintiff within the meaning of CPLR 3025(b). Indeed, plaintiff has not and cannot demonstrate that allowing defendants to assert the proposed affirmative defense, based on plaintiff's voluntary negotiation and execution of the Surrender Agreement on May 17, 2019, when the original answer was served and filed on April 5, 2019, will result in prejudice as contemplated by the statute and established case law. Plaintiff has simply failed to demonstrate that defendants' assertion of an affirmative defense seeking to enforce the terms of an agreement she voluntarily executed in exchange for valuable consideration, will result in the type of prejudice or unfairness required to deny the proposed amendment. (see, *WDF, Inc. v City of New York*, 104 AD3d 557, 960 NYS2d 644 [1st Dept 2013] [Pursuant to CPLR § 3025, leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party.]).

Accordingly, defendants' motion seeking leave to amend the answer to assert the seventh affirmative defense of waiver and release, as set forth in the proposed amended answer, is granted and the court will now consider defendants' motion to dismiss.

It is well established that "[s]tipulations of settlement are favored by the courts and not lightly cast aside (citation omitted)." (*Hallock v. State of New York*, 64 NY2d 224, 485 N.Y.S.2d [1984]; see also, *Nigro v. Nigro*, 44 AD3d 831, 843 NYS2d 664 [2nd Dept. 2007]; *Balkin v. Balkin*, 43 AD3d 967, 842 NYS2d 523 [2nd Dept. 2007]). Moreover, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse,* 54 NY2d 353, 357, 429 NE2d 1158, 445 NYS2d 687 [1981]).

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. America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276, 952 NE2d 995, 929 NYS2d 3 [2011]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98, 824 NYS2d 210 [1st Dept 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware*, 92 NY2d 934, 935, 703 NE2d 757, 680 NYS2d 899 [1998], quoting *Mangini v McClurg*, 24 NY2d 556, 563, 249 NE2d 386, 301 NYS2d 508 [1969]).

Pursuant to CPLR 3211(a)(1), to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). The court is "not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint" and can "consider documentary evidence proved or conceded to be authentic" (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471, 882 NYS2d 22 [1st Dept 2009], quoting *Four Seasons Hotels v Vinnik,* 127 AD2d 310, 318, 515 NYS2d 1 [1st Dept 1987] [internal quotation marks omitted]).

Here, defendants argue that the complaint must be dismissed in its entirety as it is barred by the plain terms of the release set forth in paragraph 5 of the Surrender and Termination Agreement. Defendants urge the court to enforce plaintiff's voluntary, compensated, and freely-bargained-for release, and dismiss plaintiff's complaint in its entirety.

Plaintiff maintains that the release was not entered into fairly and knowingly because she never had any discussions with her landlord tenant attorney, never met him or spoke to him and was never in the same room with him. (NYSCEF Doc. No. 25). In addition, plaintiff contends that she never intended to release her personal injury claims against the building's owner and

manager, when she authorized her son to coordinate her negotiation and execution of the Surrender Agreement resulting in payment to her of $50,000. Notwithstanding plaintiff's arguments to the contrary, she simply cannot avoid the legal consequence of her actions in executing the release in exchange for the payment of valuable consideration, where she released the landlord from all claims, "that are known or unknown", "of whatsoever kind or nature", "*INCLUDING ANY AND ALL CIAIMS BASED IN WHOLE OR IN PART ON THE NEGLIGENCE OR STRICT LIABILITY OF SUCH LANDLORD RELEASED PARTY*." (NYSCEF Doc. No. 18, ¶5, emphasis in original).

Plaintiff voluntarily chose to approach her landlord to negotiate a surrender of her rent stabilized apartment in exchange for a cash payment and authorized her son to coordinate the resolution of that transaction which culminated in the execution of a binding Surrender and Termination Agreement. The Surrender Agreement is a binding contract, and a party seeking to set it aside must make the same showing necessary to invalidate a contract, such as the presence of fraud, collusion, mistake or accident, overreaching, or that its terms are unconscionable (see *McCoy v Feinman*, 99 NY2d 295, 302, 785 NE2d 714, 755 NYS2d 693 [2002]; *Rogers v Malik*, 126 AD3d 874, 875, 5 NYS3d 525 [2d Dept 2015]). This is especially true when the parties have been represented by counsel (see *Rogers v Malik*, 126 AD3d at 875).

Plaintiff's affidavit indicates that she knowingly signed the Surrender Agreement without duress or coercion, and with the advice of counsel. Plaintiff has not sufficiently alleged the presence of fraud or overreaching, or any facts sufficient to set aside the terms of the Surrender Agreement as unconscionable. Plaintiff's claims that the Surrender Agreement was not intended to release her negligence claim against the building owner and manager because its terms related solely to her surrender of the apartment and because there is no mention of the personal injury

litigation and no accompanying hold harmless agreement or corresponding insurance company documentation that would normally accompany a general release, are simply unavailing in light of the plain language set forth in paragraph 5 of the agreement. Indeed, the release language which operates to bar the claims alleged in the complaint, is in bold and italicized print and does not contain any qualifying language limiting the scope of the release.

Plaintiff has admitted that she relied on her son and the attorney retained to negotiate the terms of the Surrender Agreement and concedes that she did not read the agreement before signing it, nor did she request that the document be translated to her native language before voluntarily signing the document. Defendants have correctly noted that a party will not be excused from reading a document that he or she has signed, including a release from liability, as it is well established that "[h]e who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms." (see *Metzger v Aetna Ins. Co*., 227 NY 411, 416, 125 NE 814 [1920]; see, also *Blog v. Battery Park City Auth*., 234 AD2d 99, 100, 650 NYS2d 713 [1st Dept 1996]).

Similarly, plaintiff's attempt to avoid the legal consequence of the document she voluntarily signed on the basis that she does not speak English is equally unavailing, as "'[a] party who executes a contract is presumed to know its contents and to assent to them' [and] [a]n inability to understand the English language, without more, is insufficient to avoid this general rule". (see, *Holcomb v TWR Express, Inc*., 11 AD3d 513, 514, 782 NYS2d 840 [2d Dept 2004], quoting *Moon Choung v Allstate Ins. Co*., 283 AD2d 468, 468, 724 NYS2d 882 [2d Dept 2001]; see *Pimpinello v Swift & Co.,* 253 NY 159, 162-163, 170 NE 530 [1930]; *Sofio v Hughes*, 162 AD2d 518, 520, 556 NYS2d 717 [2d Dept 1990]). Plaintiff has failed to demonstrate any valid

basis for setting aside the release set forth in the Surrender and Termination Agreement which bars the claims alleged in the complaint.

Accordingly, it is hereby

ORDERED that defendants' motion for leave to amend the answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served *nunc pro tunc*; and it is further

ORDERED that defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, without costs and disbursements.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/31/2020
DATE

W. FRANC PERRY, J.S.C.

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