SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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SUSAN BERNSTEIN,

Plaintiff,

- v -

NORSEL REALTIES LLC and STEINBERG & POKOIK MANAGEMENT CORP.,

Defendants.

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INDEX NO. 161248/2017

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54-71, 74-82 were read on this motion to/for a STAY.

The underlying case for this motion involves a personal injury action wherein plaintiff Susan Bernstein alleges that she sustained injuries on January 7, 2015 as a result of the negligence of defendants Norsel Realties LLC and Steinberg and Pokoik Management Corp. Plaintiff sought and received a judgment from this Court on January 14, 2020 in the amount of $202,875.41 pursuant to CPLR 5003-a. Affirmation of Robert M. Michell dated March 5, 2020, Exh. M (Judgment). Defendants now seek relief from this judgment under CPLR 5015, and move for an order (1) staying the execution of the judgment filed by plaintiff until 30 days after this motion is decided; (2) vacating the judgment filed by plaintiff; (3) compelling plaintiff to provide agreed upon settlement documents, including a release of the defendants and insurance carriers as to the release of obligations pertaining to any and all liens as well as a hold harmless agreement; and (4) other and further relief that this Court deems proper. Michell Aff., para. 3.

Defendants aver that the parties settled this matter in principle for the amount of $195,000.00 on August 8, 2019, following a mediation held on July 15, 2019. Michell Aff. paras. 6–7. On August 21, 2019, plaintiff tendered a standard set of settlement documents to defendants

including a release, stipulation of discontinuance, a W9 form, and an affidavit of no liens. Michell Aff. Exh. B. At the time, defendants did not request any specific settlement documents, and retained the tendered documents without objection. Affirmation of Herschel Kulefsky dated June 29, 2020, para. 6. Although defendants claim that they called plaintiff's counsel to advise him that the settlement documents were incomplete because they did not contain a release of the defendants and the insurance carriers pertaining to liens in this matter, defendants fail to provide evidence of these communications via documents or an affidavit or an affirmation from an individual with personal knowledge, and there is no date given for the call and no identification of whom defendants' counsel allegedly spoke to. Michell Aff. paras. 8–9.

On August 30, 2019, defendants' counsel received a letter from Meridian Resource, LLC ("Meridian") describing a lien—in connection with a self-funded employee welfare benefit plan that plaintiff was enrolled in—governed by the Employee Retirement Income Security Act of 1974 (ERISA) in the amount of $3,530.34 against plaintiff. Defendants claim the Meridian letter contradicts the affidavit of no liens provided by plaintiff. Michell Aff. para. 9 and Exhs. C & D. The ERISA lien letter caused the defendants to call and email plaintiff on September 5, 2019, regarding the settlement documents that plaintiff tendered on August 21, 2019. In the email, defendants notified plaintiff's counsel that the settlement documents he tendered were insufficient because they do not contain language in the release which indicates that plaintiff will be resolving any liens regarding this accident or lawsuit. Michell Aff. Exh. E. In the interest of accommodating defendants' concerns, plaintiff's counsel sent an email to defendants on September 26, 2019, asking them to provide whatever forms they required. Michell Aff. Exh. F; Kulefsky Aff. para. 11. Defendants did not respond until October 9, 2019, when they followed-up on their earlier request but did not provide any additional forms for plaintiff to sign. Michell

Aff. Exh. G; Kulefsky Aff. para. 11. Indeed, it was not until November 5, 2019 that defendants' counsel provided plaintiff with the forms they wanted; this was 78 days after plaintiff had tendered the original releases. Michell Aff., Exh. H; Kulefsky Aff. para. 11.

At this point, plaintiff had taken steps to enter judgment pursuant to CPLR 5003-a, which provides that in the event that a defendant fails to promptly pay all sums required pursuant to the parties' settlement agreement, the plaintiff may enter judgment, without further notice, against the defendant. Plaintiff's filings with respect to the proposed judgment resulted in no fewer than 17 notifications being sent to defendants' counsel. Kulefsky Aff. paras. 11–12, Exh. C (NYSECF notifications). On January 14, 2020, a judgment was entered in favor of plaintiff pursuant to CPLR 5003-a in the amount of $202,875.4 plus costs and interest. Michell Aff. Exh. M.

From November 2019 through January 2020, when judgment was entered, defendants failed to raise any objection to the entry of the proposed judgment, despite the fact that they were notified via e-filing that plaintiff was seeking entry of judgment under CPLR 5003-a. It was only after the judgment was entered that defendants reached out to plaintiff's counsel and sought to have the judgment withdrawn, which plaintiff refused to do. Michell Aff. para. 19. On February 14, 2020, one month after judgment had been entered, defendants tendered a check to plaintiff's counsel in the full settlement amount of $195,000.000 with the endorsement "full and final settlement," but not inclusive of the costs and interest contained in the judgment. Kulefsky Aff. Exh. A (copy of settlement check). Plaintiff did not deposit the settlement check.

Defendants now move to vacate the judgment pursuant to CPLR 5015 on the grounds that: (1) there was no final settlement until such a time as all of the requisite documents had been full executed and furnished to defendants; (2) the ongoing nature of the negotiation process was apparent and manifested by exchanges between both parties which took place; and (3) it was an

act of deception by the plaintiff to engage in repeated interaction to satisfy original settlement terms while "at the same time proceeding surreptitiously to procure an illusory judgment." Michell Aff. para. 30.

Although defendants do not cite to any specific paragraph of CPLR 5015, they appear to be moving under CPLR 5015(a)(3). CPLR 5015(a)(3) provides that a court may relieve a party from a judgment on the grounds of "fraud, misrepresentation or other misconduct of an adverse party." These factors are applicable to "what has either occurred prior to the judgment or was the means by which the judgment was obtained." *Herskowitz v. Friedlander*, 224 A.D.2d 305, 306 (1st Dep't 1996). A judgment entered through "fraud, misrepresentation or other misconduct practiced on the court is a nullity." *Hernandez v. American Transit Ins. Co.*, 2 A.D.3d 584, 585 (2nd Dep't 2003). Courts have noted that a judgment may be vacated if submitted by a party who provides—or omits—material facts that mislead the court in entering judgment. *See, e.g. Curcio v. J.P. Hogan Coring & Sawing Corp.*, 303 A.D.2d 357, 358 (2nd Dep't 2003) (affirming vacatur of a judgment entered pursuant to a purported oral settlement where plaintiff's counsel could not have held a good faith belief that the matter had actually been settled and plaintiff's counsel misled the Clerk of the Supreme Court by stating that the parties agreed to settle the litigation for $25,000).

Here, the defendants argue that plaintiff improperly misrepresented to the Court that a settlement between the parties had been reached when, in fact, there was no meeting of the minds as to the final settlement because the parties were still negotiating the language of the release documents, which defendants deemed insufficient because the release that plaintiff provided did not name defendants' insurance carrier and law firm. Michell Aff. paras. 22–24. Defendants

claim these omissions were significant, and therefore plaintiff never furnished a duly executed release and stipulation under the terms of the parties' agreement. *Id.*

However, defendants' argument that "it is obvious that no meeting of the minds as to the settlement had been reached" is not only belied by their own affirmation in support of this motion in which they concede that the parties had reached a settlement in principle on August 8, 2019 for the amount of $195,000, but also by the fact that defendants tendered a check to plaintiff's counsel on February 14, 2020 for the settlement amount of $195,000, without ever obtaining the revised release language that they now claim was required under the parties' agreement. Michell Aff., paras. 6–7; Kulefsky Aff. Exh. A (copy of defendant insurer's check dated February 14, 2020). By tendering this payment, defendants acknowledge that the parties reached an agreement to settle this matter in principle, as it is generally established that the acceptance of a check tendered in full settlement of a disputed claim operates as a satisfaction of that claim. *Pothis v. Arverne Houses, Inc.*, 269 A.D.2d 377 (2nd Dep't 2000). Significantly, defendants do not address this settlement payment in their motion papers, even though the motion was filed after this payment was tendered.

Further, it is notable that the check tendered by defendants does not include the accrued interest and costs that was awarded to plaintiff under the judgment. By tendering the settlement amount after judgment was entered, defendants appear to be trying to evade interest accruing on the judgment. If defendants' motion was granted and the judgment vacated, plaintiff would be deprived of the interest and costs that she is statutorily entitled to and which were awarded in the judgment. Since defendants have already tendered a settlement check in the amount of $195,000, vacating this judgment will have the effect of allowing the defendants to have used plaintiff's money for six months, without interest—in effect, an interest-free loan.

Moreover, defendants' argument that there was no meeting of the minds is further belied by their actions in response to the plaintiff's tender. Defendants failed to object to the plaintiff's tendered release of August 21, 2019 until September 5, 2019, after they received the ERISA lien letter. Further, although defendants claim that the release language was deficient, defendants failed to provide plaintiff with the release language they wanted until November 5, 2019—78 days after plaintiff had tendered releases and a stipulation of discontinuance. Michell Aff. Exh. H. If defendants genuinely believed that this was a significant issue, they should have acted promptly by raising their objections and providing plaintiff with the release language they required.

Rather, it appears that defendants' objection to plaintiff's release was triggered by the letter from Meridian regarding an ERISA lien against plaintiff. Defendants maintain that because the settlement agreement was inclusive of liens and costs, Meridian's notice of an ERISA lien against plaintiff renders the settlement agreement invalid because the letter contradicts an affidavit of no liens tendered by plaintiff. Michell Aff. para. 10 and Exh. D. However, ERISA only provides for "appropriate equitable relief" through the enforcement of a contractually based agreement and an action against a plan member, not a defendant; no case has held that an ERISA plan can bring an ERISA claim against a defendant who has settled with a plan beneficiary, and therefore, a defendant owes no duty to an ERISA plan. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer. Poirot & Wainsbrough*, 354 F.3d 348, 356 (5th Cir. 2003); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680, 687 (7th Cir. 2003); *Calhoon v. Trans World Airlines. Inc.*, 400 F.3d 593, 598 (8th Cir. 2005). Further, any action against the defendant by an ERISA plan would be barred by the three-year statute of limitations, as the accident which forms the basis of this action occurred in January

2015. *Allstate Ins. Co. v. Stein,* 1 N.Y.3d 416, 420 (2004). Thus, contrary to defendants' contentions, the ERISA lien letter does not contradict plaintiff's affidavit of no liens. *Cf Liss v Brigham Park Coop. Apts. Sec. No. 3, Inc.*, 264 AD2d 717, 718 (2nd Dept 1999) (holding where Federal law permits collection of a lien amount directly from a defendant, it is incumbent on the plaintiff to provide for the release of the lien in the general release and stipulation); *White v. New York City Hous. Auth.*, 16 Misc.3d 598, 600 (Sup. Ct. Kings. Cty. 2007).

Finally, defendants contend that plaintiff did not act in good faith by engaging in discussions with the defendants regarding closing documents while surreptitiously pursuing the entry of the judgment. Michell Reply Aff. para. 27. This argument was first interposed by defendants in their reply affirmation, which was not authorized by the Court as this application was brought by order to show cause. However, even if the Court considers the defendants' unauthorized reply papers, this argument lacks merit. Although CPLR 5003-a does not include a procedural mechanism by which the defendant may oppose an application for entry of judgment, as plaintiff's counsel avers, "[d]efendant's counsel could have stopped the judgment from being entered by bringing an Order to Show Cause, filing an objection by ECF, writing a letter, or even calling or emailing my office to object to my attempts to enter judgment." Kulefsky Aff. para. 17; *see Fox v. T.B.S.D. Inc.*, 278 A.D.2d 612, 612 (3d Dep't 2000) (noting that while judgment can be entered without further notice to the defendant under CPLR 5003-a, there is no bar to submitting opposition papers in the event that defendant receives notice of the application). Defendants do not address this issue in their papers, but rather assert that they were unaware that plaintiff sought entry of judgment under CPLR 5003-a. However, this argument is contradicted by the fact that defendants' counsel received no fewer than 17 notifications via NYSCEF regarding the proposed judgment. Kulefsky Aff. Exhs. B and C. Thus, there can be no dispute

that defendants were fully aware that plaintiff was pursuing its rights under CPLR 5003-a to enter judgment based on the parties' settlement agreement and yet failed to raise any objection until after the judgment was entered.

Accordingly, it is

ORDERED that the motion is denied.

8/31/20
DATE

PAUL A. GOETZ, J.S.C.

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