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| <b>Escalante v Vasquez-Santos</b>  |
| 2021 NY Slip Op 33070(U)   |
| November 4, 2021   |
| Supreme Court, Bronx County  |
| Docket Number: Index No. 0350189/2014E   |
| Judge: Veronica G. Hummel  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, IAS PART 31**

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**ESCALANTE, JULIA**

**Index №. 0350189/2014E**

**-against-**

**Hon. VERONICA G. HUMMEL**

**VASQUEZ-SANTOS, SAMUEL E.**

**Acting Justice Supreme Court**

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The following papers were read on this motion ( Seq. No. 4 ) for **compromise** noticed for and submitted on 6/22/21.

|   |                   |
|---|-------------------|
| Notice of Petition - Affirmation and Exhibits | NYSCEF Doc. # 6-9 |
|---|-------------------|

The following papers were read on this motion ( Seq. No. 5 ) for **compromise** noticed for and submitted on 6/22/21.

|  |                     |
|--|---------------------|
| Notice of Petition                             | NYSCEF Doc. # 10    |
| Affirmations and Exhibits ( <b>RETURNED</b> )  | NYSCEF Doc. # 11-13 |
| Relevant documents not linked by motion number | NYSCEF Doc. # 14-17 |

Upon the foregoing papers, it is ordered that the motions by plaintiffs [mot. seq. 4 and mot. seq. 5] for an order pursuant to C.P.L.R. Section 1207 granting permission to settle the within matter on behalf of the infant plaintiff Y.A., in the sum of FIVE THOUSAND (\$5,000.00) DOLLARS, and to settle and compromise the within matter on behalf of the infant A.G. for FIFTEEN THOUSAND (\$15,000.00) DOLLARS, are decided in accordance herewith.

The papers in this motion/petition seeking leave to compromise and settle the infant’s cause of action all bear the full name of the infant, in violation of Uniform Rule 202.5, mandating that Confidential Personal Information (CPI) be redacted. Upon renewal, Counsel shall only e-file papers that comply with the reaction of CPI, as required by the Uniform Rules. All papers must be filed in NYSCEF.

The papers submitted in support of the proposed infant compromise are as follows:

|                                  |                                   |
|----------------------------------|-----------------------------------|
| NYSCEF 6                         | Notice of Petition                |
| NYSCEF 7                         | Attorney’s affirmation            |
| NYSCEF 8                         | Doctor’s affirmation              |
| NYSCEF 9                         | Proposed compromise order         |
| NYSCEF 10                        | Notice of Petition                |
| NYCEF 11                         | Attorney’s Affirmation – RETURNED |
| NYSCEF 12                        | Doctor’s Affirmation – RETURNED   |
| NYSCEF 13                        | Proposed Order – RETURNED         |
| NYSCEF 14 (not tagged to motion) | Compromise Order                  |
| NYSCEF 15 (not tagged to motion) | Guardian’s Affidavit              |
| NYSCEF 16 (not tagged to motion) | Doctor’s Affirmation              |
| NYSCEF 17 (not tagged to motion) | Attorney’s Affirmation            |

CPLR §1207, sets forth the procedure to place a proposed settlement compromise of an infant's cause of action before the Court. As appropriate, counsel should choose either a Petition/Special Proceeding if no action has yet been commenced, or a motion if a Summons has been filed. The statute provides further, that "Notice of the motion or petition shall be given as directed by the Court." This would indicate that the application be brought by Order to Show Cause and Petition or a motion brought by Order to Show Cause. The custom and practice in the 12<sup>th</sup> Judicial District was to file the Proposed Infant Compromise Order (ICO) together with all required supporting papers with the Motion Support Office. Since COVID and NYSCEF, the papers are e-filed, reviewed by the ICO Clerk, and then forwarded to Judge's Chambers for further review, correction of papers, if necessary, and scheduling of a virtual ICO hearing.

CPLR R1208 sets forth the settlement procedure and papers required.

**R 1208. Settlement procedure; papers; representation**

(a) Affidavit of infant's or incompetent's representative. An affidavit of the infant's or incompetent's representative shall be included in the supporting papers and shall state:

1. his name, residence, and relationship to the infant or incompetent;
2. the name, age, and residence of the infant or incompetent;
3. the circumstances giving rise to the action or claim;
4. the nature and extent of the damages sustained by the infant or incompetent, and if the action or claim is for damages for personal injuries to the infant or incompetent, the name of each physician who attended or treated the infant or incompetent or who was consulted, the medical expenses, the period of disability, the amount of wages lost, and the present physical condition of the infant or incompetent;
5. the terms and proposed distribution of the settlement and his approval of both;
6. the facts surrounding any other motion or petition for settlement of the same claim, of an action to recover on the same claim or of the same action;
7. whether reimbursement for medical or other expenses has been received from any source; and
8. whether the infant's or incompetent's representative or any member of the infant's or incompetent's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's or incompetent's claim and, if so, the amount paid or to be paid in settlement of such claim or if such claim has not been settled the reasons therefor.

(b) Affidavit of attorney. If the infant or incompetent or his representative is represented by an attorney, an affidavit of the attorney shall be included in the supporting papers and shall state:

1. his reasons for recommending the settlement;
2. that directly or indirectly he has neither become concerned in the settlement at the instance of a party or person opposing, or with interests adverse to, the infant or incompetent nor received nor will receive any compensation from such party, and whether or not he has represented or now represents any other person asserting a claim arising from the same occurrence; and
3. the services rendered by him.

(c) Medical or hospital report. If the action or claim is for damages for personal

injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers.

(d) Appearance before court. On the hearing, the moving party or petitioner, the infant or incompetent, and his attorney shall attend before the court unless attendance is excused for good cause.

(e) Representation. No attorney having or representing any interest conflicting with that of an infant or incompetent may represent the infant or incompetent.

(f) Preparation of papers by attorney for adverse party. If the infant or incompetent is not represented by an attorney the papers may be prepared by the attorney for an adverse party or person and shall state that fact.

In addition, the Uniform Rules, 22 NYCRR, supplement the requirements as follows:

### **202.67 Infants' and incapacitated persons' claims and proceedings**

(a) The settlement of an action or claim by an infant or judicially declared incapacitated person (including an incompetent or conservatee) shall comply with [CPLR 1207](#) and [1208](#) and, in the case of an infant, with [section 474 of the Judiciary Law](#). The proposed order in such cases may provide for deduction of the following disbursements from the settlement:

- (1) motor vehicle reports;
- (2) police reports;
- (3) photographs;
- (4) deposition stenographic expenses;
- (5) service of summons and complaint and of subpoenas;
- (6) expert's fee, including analysis of materials; and
- (7) other items approved by court order.

The order shall not provide for attorney's fees in excess of one third of the amount remaining after deduction of the above disbursements unless otherwise specifically authorized by the court.

(b) The petition or affidavit in support of the application also shall set forth the total amount of the charge incurred for each doctor and hospital in the treatment and care of the infant, or incapacitated person and the amount remaining unpaid to each doctor and hospital for such treatment and care. If an order be made approving the application, the order shall provide that all such charges for doctors and hospitals shall be paid from the proceeds, if any, received by the parent, guardian, or other person, in settlement of any action or claim for the loss of the infant's, or incapacitated person's services; provided, however, that if there be any bona fide dispute as to such charges, the judge presiding, in the order, may make such provision with respect to them as justice requires. With respect to an incapacitated person, the judge presiding may provide for the posting of a bond as required by the Mental Hygiene Law.

(c) If the net amount obtained for the infant or incapacitated person in any approved settlement does not exceed the amount set forth in [CPLR 1206\(b\)](#), the court may permit it to be paid pursuant to [CPLR 1206\(b\)](#). The court may order in any case that the money be deposited or invested pursuant to [CPLR 1206\(c\)](#) or held for the use and benefit of the infant, or incapacitated person as provided in [CPLR 1206\(d\)](#) and [CPLR 1210\(d\)](#).

(d) The affidavit of the attorney for a plaintiff, in addition to complying with [CPLR 1208](#), must show compliance with the requirements for filing a retainer statement and recite the number assigned by the Office of Court Administration, or show that such requirements do not apply.

Additionally, the Court notes that this action is marked disposed and settled in the Court records as well as a stipulation of discontinuance having been e-filed and accepted by NYSCEF. This, notwithstanding that the proposed ICO's have not been approved by any Justice of the Supreme Court.

Furthermore, when the infant is over the age of 14, the infant's consent is required and is submitted in affidavit form. The following are common pitfalls that Counsel should be wary of and be meticulous in preparing and reviewing before submitting any proposed ICO:

The caption of the ICO must match the Summons.

Is the guardian's affidavit of facts based on first-hand knowledge? If not, what is it based on ?

Did the Complaint contain a cause of action on behalf of the guardian for loss of services?

Does the guardian waive the cause of action for loss of services?

In the medical affirmation, does the physician state that he has reviewed the infant's medical records?

Did the physician conduct an exam of the infant in person or virtually?

Does the proposed ICO provide that there shall be withdrawals except upon further Court order?

Does the proposed ICO provide that the infant's funds on deposit may be withdrawn after the infant turns eighteen?

Is the filing of a bond dispensed with?

Does the order provide for multiple accounts at different banks if the amount on deposit exceeds the FDIC limit?

Does the proposed ICO contain a provision for withdrawal for annual tax preparation expenses and payment of State, local and Federal income taxes, upon further application ?

Does the proposed ICO contain a provision that proof of compliance with the Order be e-filed by attorney affirmation and redacted copy of the deposit to the account ?

As can be seen from the foregoing, the settlement of an infant's claim/case has numerous statutory requirements as well as local rules that must be complied with.

The instant applications are deficient and accordingly denied without prejudice to submission of proposed ICO's in accordance with the requirements as set forth in this decision/order.

The Clerk and NYSCEF shall expunge the marking of this action as settled and disposed and restore the action to full active status and it shall remain as such until a proper ICO has been approved.

This is a Court order.

**Dated: November 4, 2021**

**Hon.** s/Hon. Veronica G. Hummel/signed 11/04/2021

**VERONICA G. HUMMEL, A.J.S.C.**

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1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
2. MOTION IS.....  GRANTED     DENIED     GRANTED IN PART     OTHER
3. CHECK IF APPROPRIATE.....  SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT