

**Enoch v Ebmeyer**

2023 NY Slip Op 31798(U)

May 25, 2023

Supreme Court, Wayne County

Docket Number: Index No. 85096

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 3<sup>rd</sup> day of May, 2023.

PRESENT: Honorable Daniel G. Barrett  
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WAYNE

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JANET E. ENOCH, STEVE O. HINDI, AND  
MICHAEL KOBLISKA,

DECISION  
Index No. 85096

Plaintiffs,

-vs-

JEFFREY EBMEYER, et al,

Defendants

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The Plaintiffs, Janet E. Enoch, Steve O. Hindi and Michael Kobliska have secured an Order to Show Cause requesting four forms of relief. The relief requested:

1. Amending Plaintiffs' Complaint to add a breach of contract as the seventh cause of action pursuant to CPLR §3025;
2. Awarding summary judgment on behalf of the Plaintiffs for breach of contract, and ordering the Defendants to perform their obligations under the contract pursuant to CPLR§3212;
3. Entering judgment on behalf of Plaintiffs pursuant to CPLR §5003-a;

4. Awarding Plaintiffs \$20,000.00 in attorney's fees, for being forced to engage in unnecessary legal work due to the frivolous conduct of the Defendants, or in the alternative, to direct Plaintiffs' attorney to submit an affidavit of service rendered documenting the time spent in response to Defendants' frivolous conduct, or in the alternative, setting the matter down for a hearing pursuant to NYCRR 130.

### **PRELIMINARY MATTERS**

The Plaintiffs are represented in both of the underlying actions by Nora Constance Marino, Esq., who will be referred to as "Marino". All of the Defendants are represented by Assistant Attorney General Matthew Brown, Esq., who will be referred to as "Brown". This matter involves two actions, one commenced in the Court of Claims and the other commenced in Supreme Court. The parties settled each of these cases for \$25,000.00 for a total of \$50,000.00. This Decision will not differentiate between these two cases. The individual defendants in the State Court action are indemnified by the State pursuant New York Public Officer's Law §17.

### **BACKGROUND INFORMATION**

The parties reached a settlement of these two underlying actions in which the Defendants agreed to pay a total of \$50,000.00.

A "Stipulation of Settlement and Release" was prepared by Brown on behalf of the Defendants. This Stipulation of Settlement was signed by all Plaintiffs and Marino. A Stipulation of Discontinuance was signed by Marino as well as a W-9 form. Prior to executing the settlement papers there was a discussion between counsel relative to the requirement of a Medicare Affidavit. Since the Plaintiffs did not suffer any physical injuries Brown withdrew his request for its inclusion. There had been no discussion whatsoever about the Plaintiffs providing individual W-9 Forms.

On September 6, 2022, the executed Stipulation and Release signed by all Plaintiffs and Marino, a Stipulation of Discontinuance signed by Marino and a W-9 form signed by Marino were transmitted to Brown by email. It was agreed that the Defendants would have ninety (90) days to remit the settlement draft beginning on the date that they received the settlement papers.

On November, 4, 2022, November 14, 2022, November 18, 2022, November 25, 2022 and November 28, 2022, Marino emailed Brown with a friendly reminder that the ninety (90) days for the receipt of the settlement draft was approaching.

The ninety (90) day deadline was December 5, 2022. On December 6, 2022 Brown contacted Marino and informed her that the checks could not be issued because each of the Plaintiffs did not submit an affidavit regarding Medicare reimbursement. As previously noted, these affidavits had been discussed and the parties agreed they were not necessary prior to signing the Stipulation of Settlement. On December 20, 2022, Marino provided the executed affidavits regarding Medicare.

Brown informed Marino that the Comptroller's office was not issuing settlement checks. In an effort to resolve the matter, Brown suggested that if the Plaintiffs would provide the last four digits of their Social Security numbers, that would resolve the issue. On January 14, 2023 Marino provided this information by way of a telephone call.

On February 24, 2023, Marino received some mail from the Attorney Generals Office (not from Brown) requesting she sign a "voucher" and a "substitute W-9". Marino returned the voucher and W-9 via overnight delivery.

Several days later, Brown informed Marino the settlement check would not be issued without W-9 forms submitted for each of the Plaintiffs. This is the first time that this particular request was made.

Marino proposed an amendment to the Stipulation and Release requiring the settlement checks be made payable to “Nora Constance Marino, as attorney” and delete the names of the Plaintiffs from the checks. Brown agreed to this modification with the mistaken belief that it would satisfy the Comptroller’s request.

This modification was unacceptable to the Comptroller’s office. It required W-9’s from the individual Plaintiffs.

At the present time W-9 forms from each of the Plaintiffs have not been provided and the settlement drafts have not been issued.

### **AMENDED COMPLAINT**

A pre-condition to the proposed seventh Amended Complaint regarding the alleged breach of the Defendants in delivering the settlement checks within ninety (90) days is that the cases are settled. There is no dispute that the underlying six causes of action have been settled to the satisfaction of all parties. The six causes of action listed in the proposed Amended Complaint have merged into the settlement of the case. Thus, there is no Complaint to amend. Plaintiffs are free to commence an independent action to address a breach of contract cause of action. Thus, this Court is denying the application to amend the Complaint.

### **SUMMARY JUDGMENT ON AMENDED COMPLAINT**

Summary Judgment is unavailable as there is no outstanding actions in which to amend the Complaint.

## JUDGMENT PURSUANT TO CPLR §5003-a

In the moving papers, Plaintiffs submitted a Stipulation of Discontinuance executed by Marino but lacking the signature of Brown. In the commentaries of McKinney's CPLR §5003-a page 202 the commentator refers to the case GEICO General Insurance Company vs. Times Cab Corp., 68 Misc. 3d 1212 [A], (Civ. Ct. City of New York 2020). The copy of the Stipulation of Discontinuance was executed only by the Plaintiff, and therefore was not an enforceable Stipulation at all (CPLR §2104). The commentator concluded that "CPLR §5003-a is therefore simple, but exacting in its application. Plaintiffs' attorneys beware."(McKinney's supra page 203).

The second reason why judgment cannot be granted under CPLR §5003-a is that the statute provides in part

When an action to recover damage has been settled and the settling defendant is the state, an officer or employee of the state entitled to indemnification pursuant to §17 of the Public Officers Law, ... payment of all sums due to any settling plaintiff shall be made within ninety days of the comptroller's determination that all papers required to effectuate the settlement have been received by him.

The Defendant submitted a copy of IRS Training Manual, MSSP, Lawsuit Awards and Settlements, training 3123-009 (11-00). In addition, a number of cases were provided that stand for the proposition that settlement awards attributable to emotional distress or mental anguish not accompanied by physical injury are taxable as income. That seems to be the case at bar. Emotional injuries with no physical injury and no out of pocket health expenses. Since it is taxable income, the Comptroller required executed W-9 forms from each Plaintiff.

A case on point is Trostle v N.Y. State Dep't of Corr. and Cmty. Supervision decided in 2017 in the U.S. District Court for the Northern District of New York, 2017 U.S. Dist. Lexis 217355, which held that after an agreed judgment was entered in favor of the plaintiff against the defendants, the defendant requested a W-9 form from the plaintiff. Plaintiff's counsel refused. The court directed the plaintiff to sign any appropriate documentation as a pre-requisite for the payment of the judgment, including the standard voucher required by the Comptroller's office as well as the W-9 form.

The case at bar is distinguishable from Klee v Americans Best Bottling Co. Inc., 76 A.D. 3d 544 (2<sup>nd</sup> Dep't 2010) wherein the court held providing a W-9 form from plaintiff was not required to issuance but prior to issuing of settlement proceeds. Klee involved personal injury settlement proceeds which were not a part of "gross income" within the meaning of the Internal Revenue Code and, neither taxable nor subject to reporting.

The Defendants in the State action are indemnified by the state under New York Public Officers Law §17. New York Public Officers Law §17 (3) (d) provides, in part,

...settlement shall be certified for payment by such head of the department, commission, division, office or agency. If the Attorney General concurs on such certification, a judgment or settlement shall be paid upon the audit in warrant of the Comptroller.

Brown indicated that after he received the executed Stipulation of Settlement he sent the paperwork up his chain-of-command for certification by Attorney General. After the Attorney certified the settlement, the settlement was sent to the head of the agency for certification. The New York State Trooper certified the settlement and it was sent to the Comptroller's office.

The Comptroller's office required the Plaintiffs to provide executed Medicare Affidavits. These affidavits were secured and provided to the Comptroller's office for approval.

The Comptroller's office then required W-9 tax forms from each of the Plaintiffs.

In order to avoid providing W-9 forms from each of the Plaintiffs, Brown agreed with Marino to amend the Stipulation of Settlement to provide that the checks be made payable to "Nora Constance Marino, as attorney".

This amendment was agreed to on the mistaken belief that the change in payment would negate the Comptroller's need for an executed W-9 form from the Plaintiffs.

This amendment did not satisfy the Comptroller's office in that the Plaintiffs would ultimately receive their share of the proceeds which would be taxable income to them.

To date, the Comptroller has not received executed W-9 forms from each of the Plaintiffs and the conditions set forth in CPLR §5003-(a) and Public Officers Law §17 have not been satisfied. Consequently, the ninety (90) day period set forth in CPLR §5003-a (c) has not begun to run.

### **22NYCRR 130-1**

Plaintiffs are seeking reimbursement for attorney's fees incurred since the settlement was not paid by September 5, 2022, ninety (90) days from when all settlement papers requested by Brown were forwarded to Brown. Beginning on December 6, 2022 the Comptroller kept asking for additional information. On December 6, 2022 it was the Affidavit for Medicare. On February 24, 2023 the Comptroller requested a signed voucher and substitute W-9. Subsequently the Comptroller requested the W-9 forms from each individual Plaintiff.

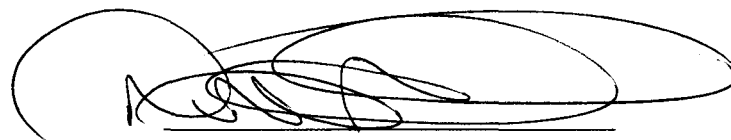


It appears that Brown was cooperative although mistaken in thinking that providing the last four numbers of the Plaintiffs' Social Security number would satisfy the Comptroller and which were provided by way of a phone call on January 14, 2023. Brown was cooperative in drafting an amendment in providing payment to Marino only with the mistaken belief that the Comptroller would be satisfied. Based on the actions of Brown the Court is not faulting him. Clearly the Comptroller appears to be responsible for the frustrating torturous path to arrive at the issuance of the settlement checks. However, this Court does not have jurisdiction to sanction the Comptroller. 22 NYCRR 130-1.1 does not include a non-party or a "real party in interest" as a person against whom a sanction may be imposed. [See Saastomoinen v Pagano, 278 A.D. 2d 218 (2<sup>nd</sup> Dep't 2000).]

It is the Decision of the Court that the four (4) forms of relief requested by the Plaintiffs are hereby denied.

Counsel for Plaintiffs to prepare an Order consistent with this Decision.

Dated: May 25, 2023  
Lyons, New York

A handwritten signature in black ink, appearing to read 'Daniel G. Barrett', is written over a horizontal line. The signature is highly stylized and somewhat illegible.

Daniel G. Barrett  
Acting Supreme Court Justice