

Goldfein v Divino

2023 NY Slip Op 34006(U)

November 9, 2023

Supreme Court, New York County

Docket Number: Index No. 805449/2016

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

CAROL GOLDFEIN,

Plaintiff,

- v -

CELIA DIVINO, M.D., DAVID BERMAN, M.D., PETER
GLICKMAN, M.D., LOUIS NEISTADT, M.D., THE MOUNT
SINAI HOSPITAL, PARK AVENUE MEDICAL
PROFESSIONALS, P.C., and LENOX HILL RADIOLOGY,

Defendants.

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INDEX NO. 805449/2016

MOTION DATE 08/08/2023

MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 012) 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300

were read on this motion to/for MISCELLANEOUS-PROMPT PAYMENT OF SETTLEMENT PROCEEDS.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 5003-a to compel the defendants Peter Glickman, M.D., Louis Neistadt, M.D., and Lenox Hill Radiology (collectively the Lenox Hill defendants) to forthwith tender her a settlement draft in the principal sum of \$400,000 or, in the alternative, to enter judgment in that sum against the Lenox Hill defendants nunc pro tunc to June 6, 2022. The Lenox Hill defendants oppose the motion. The motion is denied.

The facts of this dispute are set forth in great detail in this court's December 15, 2022 decision and order denying the plaintiff's motion to vacate a stipulation of settlement, which the plaintiff alleged that she had entered into with the Lenox Hill defendants under a mistake of fact. As explained in that decision and order, the Lenox Hill defendants were all insured under a policy of medical malpractice insurance issued by Fairway Physicians Insurance Company, A Risk Retention Group (Fairway), an entity incorporated in the District of Columbia. On August 29, 2017, the District of Columbia Department of Insurance, Securities and Banking (DC DISB)

found that Fairway was insolvent. By order dated October 25, 2017, the District of Columbia Superior Court granted the DC DISB's petition to place Fairway in liquidation, and appointed the DC DISB as liquidator. The liquidation order stayed the prosecution of all actions against Fairway's insured. By order dated September 6, 2019, however, the District of Columbia Superior Court vacated the stay, thus authorizing allegedly injured persons having claims against Fairway's policyholders to proceed with actions pending outside of the District of Columbia Superior Court, as the DC DISB elected to forego defending any such actions that were pending in courts outside of the District of Columbia. Rather, the DC DISB relied upon private attorneys in those actions to defend Fairway's policyholders.

The plaintiff and the Lenox Hill defendants entered into a written settlement agreement dated April 6, 2022, at which point the plaintiff discontinued the action against the remaining defendants. As relevant here, the agreement provided that Neistadt would execute an affidavit of confession of judgment on behalf of all of the Lenox Hill defendants, although the agreement did not specify the amount to be confessed. In fact, Neistadt executed and filed an affidavit of confession of judgment, sworn to April 27, 2022, in the principal sum of \$400,000.00. In his affidavit, Neistadt asserted that

“the Plaintiff acknowledges that payment of the Settlement Sum will flow through the Fairway Liquidation Estate, being overseen by the individual appointed by the District of Columbia Department of Insurance, Securities and Banking Commissioner as Fairway's liquidator . . . pursuant to the insolvency proceedings commenced under the following action, *District of Columbia Department of Insurance, Securities and Banking v Fairway Physicians Insurance Company, A Risk Retention Group* and known as Case Number 2017 CA 6962.”

In the agreement itself, the plaintiff consented that, upon Neistadt's filing of the affidavit, she would discontinue the action against the Lenox Hill defendants, and she agreed not to commence any further actions against them arising from their alleged malpractice. In addition, Section 3 of the agreement provided, in relevant part, that

“3.3 [t]he Parties agree that Plaintiff, or any representative, successor or assign of Plaintiff, will seek to collect the Judgments *solely from the Liquidation Estate*.

“3.4 *Regardless of the amount* that Plaintiff, or any representative, successor or assign of Plaintiff, collects from the Liquidation Estate on the Judgments, or otherwise in the event that the DC court does not give effect to the Judgments, Plaintiff and any representative, successor or assign of Plaintiff *shall remain bound by the terms of this Agreement, including the Covenant Not To Sue/Execute contained in this Article.*”

(emphasis added).

Crucially, Section 9 of the agreement provided that

“9.1 Plaintiff acknowledges that neither Defendants, nor any of Defendants' representatives, have made any oral representations to Plaintiff or any of Plaintiff's representatives.

“9.2 Plaintiff disclaims reliance on any representations other than those expressly set forth in this Settlement Agreement.

“9.3 Plaintiff acknowledges that neither Defendants, nor any of Defendants' representatives, have made any representations to Plaintiff relative to: (i) the amount of the pro rata distribution to be made to creditors of the Liquidation Estate, (ii) the amount that Plaintiff, or any representative, successor or assign of Plaintiff, will ultimately collect from the Liquidation Estate on the Judgments, and (iii) the existence of any source of recovery other than the Liquidation Estate.”

The plaintiff executed the agreement on April 6, 2022, Neistadt executed it on April 27, 2022, Glickman executed it on May 4, 2022, and Lenox Hill Radiology executed in on May 2, 2022. As this court explained in its prior order, the plaintiff has not established that she or her attorney ever spoke to, or negotiated with, any representative of the DC DISB, as liquidator, to finalize the amount of the actual distribution that would be paid from Fairway's liquidation estate and that, although the DC DISB obtained a judicial dissolution of the stay of litigation against Fairway's insureds in courts outside of the District of Columbia, it had not waived its statutory obligation as the final arbiter of settlements involving those insureds. As this court further explained, the settlement agreement in the instant matter unambiguously provided that the plaintiff would accept whatever amount the DC DISB, as liquidator, was willing to distribute in connection with the settlement, and that “[r]egardless of the amount that Plaintiff . . . collects from the Liquidation Estate,” the plaintiff would “remain bound” by the other terms of the

settlement agreement, and forego any further proceedings to collect the amount confessed by Neistadt from the Lenox Hill defendants. The settlement agreement further provided that the plaintiff would “seek to collect the [confessed] Judgments *solely from the Liquidation Estate*” (emphasis added). The plaintiff fully understood that the Lenox Hill defendants would refuse to recognize an exception to these provisions if the DC DISB agreed to distribute less than the face value of the \$400,000 set forth in Neistadt’s affidavit of confession of judgment.

Additionally, this court concluded that

“[[t]he parties fully understood that the Lenox Hill defendants’ representations could not bind the liquidator, and clearly understood that the plaintiff agreed to accept the maximum amount that she could obtain from the DC DISB, no matter what that amount might be. This conclusion is supported by the fact that no absolute amount or percentage of the confessed \$400,000 judgment is referenced in the settlement agreement as a measure of what must be paid to the plaintiff.”

The court agrees with the Lenox Hill defendants that the plaintiff’s attempt to enter a \$400,000 judgment against them pursuant to the prompt payment provisions of CPLR 5003-a, based on the confession of judgment, is expressly in conflict with this court’s December 15, 2022 order, which unambiguously held that the plaintiff would be entitled only to the amount that the DC DISB agrees to distribute from Fairway’s estate in liquidation, or any amount that the District of Columbia Superior Court may permit the DC DISB to distribute, and that she is not entitled to collect any additional amounts directly from any of the Lenox Hill defendants. Although the court acknowledges that the plaintiff is attempting to achieve the same result she sought when she unsuccessfully requested to vacate the stipulation of settlement, the court denies the Lenox Hill defendants’ cross application for the imposition of sanctions.

Nonetheless, the court directs that, within 30 days of the entry of this order, counsel for the Lenox Hill defendants shall contact the appropriate representative of the DC DISB, inquire as to the status of the plaintiff’s claim with the DC DISB, and report back to this court as to the status of the claim.

In light of the foregoing, it is

ORDERED that the plaintiff's motion is denied; and it is further,

ORDERED that, on the court's own motion, within 30 days of the entry of this order, counsel for the defendants Peter Glickman, M.D., Louis Neidstadt, M.D., and Lenox Hill Radiology shall contact the appropriate representative of the District of Columbia Department of Insurance, Securities and Banking, inquire as to the status of the plaintiff's claim with the District of Columbia Department of Insurance, Securities and Banking, and report back to this court as to the status of the claim.

This constitutes the Decision and Order of the court.

11/9/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: