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958 N.Y.S.2d 109

102 A.D.3d 451

Adwoa GYABAAH, Plaintiff-Appellant-Respondent.

v.

RIVLAB TRANSPORTATION CORP., Defendant-Respondent-Appellant,

John Doe, Defendant,

Jeffrey A. Aronsky, P.C., Non-Party Respondent-Appellant.

No. 2013-00116

Supreme Court of New York, First Department

January 10, 2013

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for appellant-respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for Rivlab Transportation Corp., respondent-appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Jeffrey A. Aronsky, P.C., respondent-appellant.

TOM, J.P., ANDRIAS, RENWICK, DeGRASSE, ABDUS-SALAAM, JJ.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 14,

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2011, which, granted nonparty law firm Jeffrey A. Aronsky, P.C.'s (Aronsky) motion to the extent of granting Aronsky leave to place a lien against the action, and denied the motion insofar as it sought an order enforcing a purported settlement and setting Aronsky's fee accordingly, affirmed, without costs.

The issue that divides this panel is whether this action has been settled. Aronsky, plaintiff's outgoing attorney, commenced this personal injury action on plaintiff's behalf on August 25, 2010. By letter to Aronsky dated October 1, 2010, defendant's carrier tendered its \$1 million policy limits for purposes of settlement. Aronsky explained the proposal to plaintiff who, at that time, chose to accept the settlement. Accordingly, plaintiff executed a general release on October 5, 2010 and a hold harmless agreement on October 12, 2010. Aronsky advised plaintiff that he would hold the release pending receipt of defendant's affidavit of no excess insurance and advice from plaintiff as to whether she preferred to have the settlement structured.

By December 9, 2010, plaintiff had retained new counsel, Kenneth A. Wilhelm, Esq. On that date, Wilhelm advised Aronsky that plaintiff did not wish to settle the case or have the release sent to defendant. Aronsky moved the court below for an order enforcing what he contended was a \$1 million settlement and setting his firm's contingency fee at one-third of the recovery pursuant to plaintiff's retainer agreement. In making his motion, Aronsky did not allege that acceptance of the offer was ever communicated to defendant or its carrier. This omission is fatal to Aronsky's claim of a settlement for reasons that follow. Aronsky maintained that " plaintiff's signing of the General

Release constituted a binding legal contract." The court denied the motion and vacated the release in what it perceived to be the interest of justice.

Although the motion court incorrectly invoked the interest of justice, the application of contract law nevertheless required the denial of Aronsky's motion. " [A] general release is governed by principles of contract law"

[102 A.D.3d 452] (*Mangini v. McClurg*, 24 N.Y.2d 556, 562, 301 N.Y.S.2d 508, 249 N.E.2d 386 [1969]). Citing *White v. Corlies*, 46 N.Y. 467, 469-470 [1871], this Court has held that " it is essential in any bilateral contract that the fact of acceptance be communicated to the offeror" (*Agricultural Ins. Co. v. Matthews*, 301 A.D.2d 257, 259, 749 N.Y.S.2d 533 [1st Dept.2002]; see also *D'Agostino Gen. Contrs. v. Steve Gen. Contr.*, 267 A.D.2d 1059, 700 N.Y.S.2d 351 [4th Dept.1999]; *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist of Brooklyn*, 76 A.D.2d 712, 714, 431 N.Y.S.2d 834 [2d Dept.1980], *affd.* 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480 [1981]). Therefore, this action was not settled because the executed release was never forwarded to defendant nor was acceptance of the offer otherwise communicated to defendant or its carrier. This record does not contain a single affidavit by anyone asserting that either occurred. Although the dissent posits that a settlement was effected despite the lack of delivery or filing of the release, it avoids discussion of the critical absence of any claim that plaintiff's acceptance of the offer was ever communicated to defendant (see *id.*) We do not share the dissent's view that an October 6, 2010 letter from defendant's counsel to Aronsky " evidenced" an agreement to settle.^[1] Defense counsel's statement in the

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letter that he was " advised" of a settlement does not suffice as evidence that such a settlement was effected. Moreover, the letter is devoid of probative value because it is unsworn (see *e.g.* *Yonkers Ave. Dodge, Inc. v. BZ Results, LLC*, 95 A.D.3d 774, 775, 945 N.Y.S.2d 280 [1st Dept.2012]). The dissent misplaces its reliance on *Calavano v. New York City Health & Hosps. Corp.*, 246 A.D.2d 317, 667 N.Y.S.2d 351 [1st Dept.1998] which it cites for the proposition that plaintiff was bound by the release despite the fact that it was never delivered or filed. *Calavano* lends no support to the dissent's conclusion because in that case the plaintiff was held to be bound by a stipulation of settlement and a general release **[102 A.D.3d 453]** which he signed and which " were then sent to defendants for a mutual release" (*id.* at 318, 667 N.Y.S.2d 351). Because there has been no settlement, the amount of Aronsky's fee should be determined upon the disposition of this action in the manner prescribed by *Matter of Cohen v. Grainger, Tesoriero & Bell*, 81 N.Y.2d 655 [1993].

Like the dissent, we see no need for a hearing to determine whether Aronsky was discharged for cause. The record discloses that plaintiff has not made a prima facie showing of any cause for Aronsky's discharge. Plaintiff stated in her affidavit that she signed the release and hold harmless affidavit because she felt " pressured" to do so. Plaintiff made no mention of what the pressure consisted of or, more importantly, what professional misconduct, if any, brought it about. To be sure, a hearing was not warranted by plaintiff's untenable argument that Aronsky disobeyed her instructions by making the instant motion albeit after he had already been discharged as her attorney. Also, we do not disturb the motion court's determination that Aronsky

is entitled to a lien on plaintiff's recovery inasmuch as his charging lien automatically came into existence upon the commencement of this action (*see Resnick v. Resnick*, 24 A.D.3d 238, 806 N.Y.S.2d 200 [1st Dept.2005]).

All concur except ANDRIAS, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting).

Because I believe that there was a binding settlement of plaintiff's claims against defendant Rivlab Transportation Corp. (Rivlab), which plaintiff sought to avoid simply because she changed her mind after she was told that she could get more money, I respectfully dissent and would reverse the order which denied the motion of nonparty appellant law firm Jeffrey A. Aronsky, P.C. (Aronsky) for an order enforcing the settlement and setting the legal fees to which Aronsky is entitled.

On August 11, 2010, plaintiff was hit by a bus owned by Rivlab. She retained Aronsky to represent her on a one-third contingency fee basis, and Aronsky filed this action that month. On October 1, 2010, after reviewing the medical records, a representative of Rivlab's insurance carrier sent Aronsky a letter confirming a conversation

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in which the carrier offered to tender the policy limit of \$1 million in full settlement of plaintiff's claims.

On October 5, 2010, Aronsky and a structured settlement attorney visited plaintiff, who signed a general release in favor of Rivlab and its carrier, which released them from all causes of action and claims she had or may have against them, " [i]n particular for injuries sustained on August 11, 2009 [sic]." Plaintiff now claims that she felt pressured to sign the release and another **[102 A.D.3d 454]** unidentified document by Aronsky's insistence that she settle and because the structured settlement attorney told her that his proposals would only be good for a week. Plaintiff alleges that the next day, after she was told by " people" that she should not be pressured into settling, she called Aronsky and told him that she had changed her mind and that he should not mail out the settlement documents without confirmation from her.

Nevertheless, on October 12, 2010, plaintiff signed a hold harmless agreement prepared by the carrier. On or about November 18, 2010, in furtherance of the settlement, the carrier sent Aronsky affidavits of no further insurance, which Aronsky reviewed with plaintiff. Plaintiff maintains that she advised Aronsky at that meeting that she still had not decided whether to settle, and that she needed to do her own research. Aronsky maintains that the only reason he did not forward the settlement documents to the carrier at that point was because plaintiff had told him that " she needed time until after the Thanksgiving holidays to decide if she would structure the settlement."

Plaintiff states that because of her dissatisfaction with Aronsky and her feeling that she was entitled to more than the \$1 million offer, she hired new attorneys to represent her. By letter dated December 6, 2010, plaintiff's new counsel provided Aronsky with a letter from plaintiff, which advised Aronsky not to do any further work and to forward the file to them. The letter also asked that Aronsky execute a Consent to Change Attorneys. By fax dated December 9, 2010, plaintiff's new counsel advised Aronsky that plaintiff was not accepting the \$1 million offer and that he should not send in the release. Aronsky then moved for an order enforcing the settlement and

fixing his fee.

New York has a strong public policy of encouraging the resolution of disputes. Stipulations of settlement " are favored by the courts and not lightly cast aside" (*Hallock v. State of New York*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178 [1984]). " [A] change of heart is insufficient" (*Sontag v. Sontag*, 114 A.D.2d 892, 893, 495 N.Y.S.2d 65 [2d Dept.1985] [internal quotation marks omitted], *lv. dismissed* 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245 [1986]), and a settlement agreement will not be set aside merely because the plaintiff, upon reevaluation, has decided that the claim is worth more (*see Muller v. City of New York*, 113 A.D.2d 877, 493 N.Y.S.2d 604 [2d Dept.1985]).

General releases are interpreted and upheld by the courts consistent with this policy (*Calavano v. New York City Health & Hosps. Corp.*, 246 A.D.2d 317, 318, 667 N.Y.S.2d 351 [1st Dept.1998]). Accordingly, in the absence of cause sufficient to invalidate a contract, such **[102 A.D.3d 455]** as fraud, collusion, mistake or accident, it was an improvident exercise of discretion for the motion court to vacate a valid release just to allow plaintiff to have her day in court after she was told that she could get more money (*see generally McCoy v. Feinman*, 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 [2002]).

Plaintiff's general contention that she felt pressured to sign the release is insufficient.

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Her claim that she withdrew her consent to the settlement the day after she executed the release is unsubstantiated and inconsistent with her execution, a week later, of the carrier's hold harmless agreement, which states, in relevant part:

" Releasor hereby declares that the terms of this Release have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final settlement of any and all claims, disputed or otherwise, on account of injuries and/or damages related to Claims set forth herein, and for the express purpose of precluding forever any further additional claims against the Release (sic) arising out of the aforesaid incident, accident or occurrence ..."

I am not persuaded by plaintiff's argument that the release is not a binding agreement. CPLR 2104 states in relevant part that " [a]n agreement between parties or their attorneys relating to any matter in an action ... is not binding upon a party unless it is in a writing subscribed by him or his attorney." In order for a writing to be enforceable as a settlement agreement under CPLR 2104, it must " incorporate all the material terms of the settlement" (*Bonnette v. Long Is. Coll. Hosp.*, 3 N.Y.3d 281, 285, 785 N.Y.S.2d 738, 819 N.E.2d 206 [2004]; *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 482, 548 N.Y.S.2d 920, 548 N.E.2d 203 [1989], *cert. denied* 498 U.S. 816, 111 S.Ct. 58, 112 L.Ed.2d 33 [1990]). Here, plaintiff signed two documents, on two separate occasions, a week apart, that unambiguously release her claims against defendant in exchange for \$1 million. The release makes clear that payment in the amount of \$1 million would be from Rivlab and its insurer, and that those entities would be jointly and severally responsible for the payment

The majority believes that there was no binding settlement because the release was not delivered to Rivlab or its carrier, who were not informed that the offer had been accepted. However, under the circumstances before us, once plaintiff signed the release and the hold

harmless agreement, she was bound by the settlement terms, pursuant to CPLR 2104, without the need for delivery or filing of the settlement documents (see *Calavano*, 246 A.D.2d at 318-320, 667 N.Y.S.2d 351).

Releases, like stipulations, are contracts and are construed according to the same general principles of contract law (see *Shklovskiy v. Khan*, 273 A.D.2d 371, 709 N.Y.S.2d 208 [2d Dept.2000]). Where the **[102 A.D.3d 456]** parties have not agreed that delivery is essential, " [a] binding contract ... may be made without a physical delivery of the instrument evidencing the contract" and " any evidence that shows that the parties to a written instrument intend that the same should be operative and binding upon them is sufficient in an action to enforce its provisions" (*Morgan Servs., Inc. v. Abrams*, 21 A.D.3d 1284, 1285, 801 N.Y.S.2d 457 [4th Dept.2005] [internal quotation marks omitted]). Here, there was no requirement in the release or hold harmless agreement obligating plaintiff to physically deliver them to Rivlab or its carrier in order to enforce them (see *Florimon v. Xianglin Xu*, 97 A.D.3d 532, 948 N.Y.S.2d 113 [2d Dept.2012]). The agreement to settle is evidenced by the carrier's letter confirming the conversation with Aronsky in which it agreed to tender the policy, by plaintiff's execution of the release and, a week later, of the hold harmless agreement prepared by the carrier, and by the carrier's submission to Aronsky of the affidavits of no further insurance.

The failure to complete the steps required to consummate the settlement was the result of the motion practice which is

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the subject of this appeal. Rivlab continues to stand ready to proffer the policy limits of \$1 million to plaintiff and to take the necessary steps to fully comply with all of the requisites enumerated in CPLR 5003-a.

Given that there was a binding settlement of the action, Aronsky is entitled to a charging lien for the agreed upon one-third contingency fee (see *Calabro v. Board of Educ. of City of N.Y.*, 39 A.D.3d 680, 681, 834 N.Y.S.2d 309 [2d Dept.2007]; *McAvoy v. Schramme*, 238 A.D. 225, 264 N.Y.S. 181 [1st Dept.1933], *affd.* 263 N.Y. 548, 189 N.E. 691 [1933]). I agree with the majority that there is no need for a hearing because plaintiff did not make a prima facie showing that Aronsky was discharged for cause (see *Friedman v. Park Cake, Inc.*, 34 A.D.3d 286, 825 N.Y.S.2d 11 [1st Dept.2006]). Evidence of a general dissatisfaction with an attorney's performance or a difference of opinion between attorney and client does not establish that the attorney was discharged for cause absent some evidence that the attorney failed to properly represent the client's interest (see *Costello v. Kiaer*, 278 A.D.2d 50, 50, 717 N.Y.S.2d 560 [1st Dept.2000]). Neither the December 6th nor December 9th letter states that Aronsky was being discharged for cause and plaintiff's self-serving allegations that she was misled by Aronsky as to the ramifications of signing the release are not supported by the record. Nor is it unethical for Aronsky to seek to enforce his fee arrangement with plaintiff.

Accordingly, the settlement should be reinstated and Aronsky granted a charging lien fixed at 33 1/3% of the proceeds of the litigation.

Notes:

[1] The full text of the letter reads as follows:

" This firm has been retained by National Casualty company to represent the interests of its insured with regard to the above matter. We have been advised that National Casualty Company, on behalf of its insured, has offered the limits of its liability policy (\$1 million) for the settlement of this action. We have been advised that plaintiff has accepted the offer. " We request that you provide the undersigned with a Stipulation of Discontinuance with prejudice, General Release and a copy of your law firm's W-9 Statement. Additionally, we have drafted a Hold Harmless Agreement for signature of the plaintiff. Please review the document and contact the undersigned if you feel changes are required. " In conclusion, kindly advise the undersigned of instructions regarding payees on the settlement draft. We are in the process of obtaining the affidavit of no excess coverage from the insured. We will forward this to you as soon as possible."
