SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS :CIVIL TERM: PART 16

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ROTEM MADAR, an infant under the age of fourteen years, by his father and natural guardian, ITSCHAK MADAR & ITSCHAK MADAR, individually,

Plaintiffs,

Decision and Order

-against-

Index No. 53502/02

1333 REALTY LLC, J.K. MANAGEMENT CORP., & MOISHE VOLKOVIC,

Defendants

December 8, 2009

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PRESENT: HON. LEON RUCHELSMAN

This decision amends the decision dated November 25, 2009.

The plaintiff has moved seeking to vacate a settlement reached between the parties settling the case for $25,000. The defendant opposes the motion and papers were submitted by both parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit concerns events which occurred on July 2, 2001 when at approximately 8:00 PM the plaintiff, a six year old at the time was playing with a friend in the hallway of defendant building. He was then instructed by the superintendent of the building to cease playing in the hallway. The plaintiff along with his friend proceeded outside where plaintiff was hit by a vehicle driven by defendant Volkovic. A lawsuit was commenced and following negotiations between plaintiff and defendant's

insurance company Gab Robins of the New York Insurance Company Liquidation Bureau for Reliance Insurance, the matter was settled for $25,000. Indeed, on October 5, 2004 Gab Robins notified plaintiff's counsel in writing that "we confirmed coverage for our insured...this policy carried limits of $25,000/$50,000." Thus, the matter was settled for $25,000 the asserted policy limits. However, on October 27, 2006 the New York Liquidation Bureau notified plaintiff's counsel, after the settlement had been concluded, that the representation the policy limits were $25,000 was "error" and that in fact the policy limits were $250,000 per person. Based on that mistake the plaintiff seeks to vacate the settlement and pursue the true policy limits. The defendant opposes the motion and presents two arguments. First defendant asserts that the settlement should not be vacated since it was the intent of both parties to settle the matter for $25,000. The defendant argues that the misrepresentation was "not a material misrepresentation" because the amount of insurance is irrelevant when negotiating a settlement. Furthermore, defendant argues that plaintiff's counsel could have requested to examine the declaration page or engaged in some discovery which would have revealed the error, thus, in essence it is the plaintiff who has acted with "unclean hands." The

defendant also noted that vacating the settlement at this juncture is unreasnable and prejudicial.

Conclusion of Law

It is well settled that absent fraud, collusion or mistake a stipulation that is fair on its face will be enforced (Berghoff v. Berghoff, 8 AD3d 519, 779 NYS2d 215 [2d Dept., 2004]). In this case, the plaintiff argues that the stipulation was based upon a mistake. There is no question that a mistake took place and that the mistake was a mutual one. Both parties were under the erroneous belief that the policy in question only contained $25,000. Thus, this case does not concern a mere unilateral mistake that is insufficient to vacate a settlement (Village of Waterford v. Camproni, 200 AD2d 930, 607 NYS2d 433 [3rd Dept., 1994]). Rather, the mistake is mutual and is not disputed (In Re Janet L., 287 AD2d 865, 731 NYS2d 299 [3rd Dept., 2001]). Moreover, and most significantly, the mistake is of a nature which then does not reflect the meeting of the minds between the parties (Vermilyea v. Vermilyea, 224 AD2d 759, 636 NYS2d 953 [3rd Dept., 1996]).

The defendant argues that a meeting of the minds existed because "the policy limits could not have had a bearing on the settlement agreement; otherwise, it would follow that the plaintiffs would have agreed to take an even lesser amount if the

policy limits were lower and would even have discontinued the case if there were no insurance" (see, Affirmation in Opposition, 13). However, policy considerations form the very essence of settlement negotiations. Similarly, an insurance company would rightly seek to vacate a settlement where they offered more than the limits of a policy (mistakenly) even though the settlement obviously incorporates the understanding the settlement is otherwise fair. Thus, the very fact a settlement was struck does not mean a mutual mistake could not have been made. It is possible that even if the plaintiff had been aware of the true policy limits the same result would have been reached. However, that is hardly a basis to conclude that the true policy limits should be ignored entirely. It is clear that a meeting of the minds did not occur and that a primary basis motivating the settlement was the erroneous information concerning the policy limits.

Moreover, the plaintiff's counsel had no duty and no reason to question the representation of insurance company that the policy limits were $25,000. The argument the plaintiff should have requested more to verify the particulars of the insurance company's representation is an undue burden which cannot render the settlement beyond review. Similarly, there is no duty to conduct discovery and hence no failure on the part of the

plaintiff who did not request any verifying documents. Moreover, the mutual mistake that took place outweighs any prejudice alleged.

Therefore, based on the foregoing the motion seeking to vacate the settlement is granted and the parties may take any action consistent with this opinion.

So ordered.

ENTER:

DATED: December 8, 2009
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC