

**Balan v City of New York**

2024 NY Slip Op 31314(U)

April 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 520514/22

Judge: Kenneth P. Sherman

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part CTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of April, 2024.

P R E S E N T:

HON. KENNETH P. SHERMAN,

Justice.

-----X  
ELISANDA BALAN,

Plaintiff,

Index No. 520514/22

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Defendants.  
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	10
Opposing Affidavits (Affirmations) _____	12, 22
Affidavits/ Affirmations in Reply _____	23
Other Papers: <u>Affirmation in Support</u> _____	7

Upon the foregoing papers, plaintiff Elisanda Balan moves, by order to show cause, for an order vacating a settlement agreement reached by the parties at a virtual settlement conference and restoring this action to active status.

Plaintiff commenced this action to recover damages for personal injuries sustained as the result of a slip and fall at a property owned and maintained by defendant New York City Housing Authority (NYCHA). On November 2, 2022, the parties appeared virtually for a settlement conference, whereupon plaintiff agreed to settle this action for \$150,000.00. Thereafter, Sierra Page, an agency attorney with the NYCHA Law

Department, sent an email to plaintiff's counsel, Jeffrey H. Schwartz, and NYCHA counsel David S. Gould and Marcin Kurzatkowski, "to confirm settlement of [this matter] for \$150,000." A NYCHA settlement checklist and CMS Medicare form was forwarded to Schwartz from Kurzatkowski by email dated November 3, 2022.

On December 13, 2022, Kurzatkowski sent an email to Schwartz following up on the "status of the settlement [documents]." By email dated December 14, 2022, Schwartz responded that he was "[w]aiting to hear from NYC HRA on lien status. Otherwise, I can forward executed documents if it would help to get the payment process started." By email to Schwartz dated February 6, 2023, Kurzatkowski inquired if Schwartz "forward[ed] the settlement [documents] on this case." In a reply email to Kurzatkowski, Susan Schwartz, a paralegal in Schwartz's office, wrote:

"The case settled in November, I have a duly executed Release, but NYC HRA/DSS has not responded to our request for a final lien amount . . . mind you the request was made more than 90 days ago, at the beginning of November. I have spent countless hours last week trying to find a contact number for Liens and Recovery, but their phone system has changed and not 1 person was able to help, so I am just waiting on HRA."

On or about April 3, 2023, plaintiff presented the instant order to show cause, which was signed by this court on April 19, 2023. In his affirmation in support of the order to show cause, Schwartz states that the \$150,000 settlement figure was based on plaintiff's then known injuries and damages which included a "tom left foot and one right foot surgery to remove screw." Schwartz contends that subsequent to the virtual settlement conference, plaintiff's injuries worsened, necessitating a second surgery on

March 23, 2023. Schwartz maintains that at the time of the settlement on November 2, 2022, plaintiff could not have foreseen the worsened injuries and second surgery. Schwartz further argues that a settlement agreement is not binding unless reduced to a written stipulation signed by the parties to be charged or made on the record in open court, neither of which scenarios are present here.

“CPLR 2104 governs the enforceability of settlement agreements” (*Martin v Harrington*, 139 AD3d 1017, 1018 [2d Dept 2016]; *see Forcelli v Gelco Corp.*, 109 AD3d 244, 248 [2d Dept 2013]). Pursuant to that statute, “a settlement agreement is binding upon a party if it is in a writing subscribed either by the party or by his or her attorney” (*Martin*, 139 AD3d at 1018; *see CPLR 2104*). “To be enforceable, a settlement agreement must set forth all material terms, and there must be clear mutual accord between the parties” (*Martin*, 139 AD3d at 1018). The Appellate Division, Second Department held that where “an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement” (*Forcelli*, 109 AD3d at 251). “An email that merely confirms a purported settlement is not necessarily sufficient to bring the purported settlement into the scope of CPLR 2104” (*Teixeira v Woodhaven Ctr. of Care*, 173 AD3d 1108, 1109 [2d Dept 2019]; *see DeVita v Macy’s E., Inc.*, 36 AD3d 751, 751 [2d Dept 2007]).

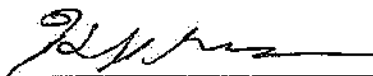
Contrary to NYCHA's contention, the emails between the parties following the conference do not constitute a stipulation of settlement properly enforceable against plaintiff under CPLR 2104. The only email setting forth any material term of the settlement was not subscribed by plaintiff or Schwartz but was rather generated and signed by NYCHA agency attorney Sierra Page confirming the settlement amount of \$150,000. The two emails from Schwartz's office submitted by NYCHA in opposition to plaintiff's motion were not directed toward the confirmatory email from Page but were responses to Kurzatkowski's emails inquiring about the status of settlement documents. Neither of these two emails recited any material terms of the purported settlement. Further, the latter of the two emails was not subscribed by Schwartz, but rather by a paralegal, Susan Schwartz.

Because there is no writing presented in this matter subscribed by plaintiff or her counsel setting forth all material terms of the stipulation reached at the virtual conference as required by CPLR 2104, the purported settlement is not enforceable against plaintiff.

Accordingly, plaintiff's motion is granted, and this action is hereby restored to active status.

The foregoing constitutes the decision and order of the court.

ENTER,



HON. KENNETH P. SHERMAN  
SUPREME COURT JUSTICE

4/10/24