

SWAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

SEBASTIAN FRAZZETTO,

Plaintiff,

MOTION DATE: 5/28/10

MOTION SEQ. NO.: 001

-against-

INDEX NO.: 003569/10

**RYDER TRUCK RENTAL, INC., ARP
AIRPORT SERVICE, INC., STEVEN K.
MORON, ARNOLD B. AMANTE and
DANIELLE L. AMANTE**

Defendants.

The following papers read on this motion (1-3):

**Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3**

The motion of defendants ARNOLD B. AMANTE and DANIELLE L. AMANTE (the "AMANTE defendants") for an Order dismissing plaintiff SEBASTIAN FRAZZETTO's complaint pursuant to **CPLR § 3211** is determined as follows.

This an action for personal injuries allegedly resulting from a motor vehicle accident involving three vehicles traveling eastbound on the Cross Bronx Expressway on March 3, 2007. Plaintiff was a passenger in the vehicle of the AMANTE defendants. Shortly after the accident, plaintiff was presented with a "Full Release of all Claims and Demands," discharging the AMANTE defendants from "any and all claims" resulting from the accident, by MICHAEL McGRATH, a claims representative for Progressive Insurance Company, ("Progressive") Plaintiff executed the release in return for a check in the amount of \$200.00.

In reponse to the AMANTE defendant's motion for an Order dismissing the plaintiff's complaint pursuant to **CPLR § 3211**, plaintiff asserts in its Affirmation in opposition that

the release is unenforceable because it was executed in circumstances demonstrating fraud in the inducement, mutual mistake and overreaching.

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . release.” CPLR §3211(a)(5). The moving party defending the suit on the basis of a release has a presumption in its favor that the release is valid. **Fleming v. Ponziani**, 24 N.Y.2d 105. However, this presumption is triggered only upon authentication of the releasor’s signature on the release. **Tesauro v. Thomas H. Tesauro Lumber Corp.**, 35 A.D.2d 607.

The Court finds that, upon examination of the evidence presented, plaintiff SEBASTION FRAZZETTO’s signature has been adequately authenticated. The Court was initially concerned with the following two deficiencies in the release: (1) the release is dated August 3, 2007 when the execution of the release is alleged to have occurred on March 3, 2007 and; (2) though the release has space designated for the signatures of witnesses to the release’s execution, no signature of a witness to the release is provided. Further, the Affidavit of MICHAEL McGRATH alone would not have overcome these deficiencies in the Court’s view.

Court’s concern over the deficiencies in the release was alleviated, however, by plaintiff’s Affidavit, in which plaintiff attests to having executed the release on March 3, 2007 in several instances:

I respectfully submit to this Court that I never intended to release the defendants from “any and all claims” and **that I signed the release** under the mistaken belief that I had not sustained any injuries in the accident. Immediately after the accident occurred, while I was dazed and shaken up, I did not believe that I had sustained any injury. Indeed despite the fact that the police and ambulance arrived at the scene of the accident, I did not go in the ambulance to the hospital and refused medical attention. I had no actual knowledge on the day of the accident, or **at the time that I signed the release**, that I had sustained any injury. Furthermore, **at the time I signed the release**, I had no time to investigate the possibility of any injuries, nor for any deliberation as to whether it was prudent to sign a release.

That I truly believe that the **timing of the release, so close to the time to the happening of the accident** (emphasis added) . . .

Thus, plaintiff's Affidavit renders the signature of a witness unneeded for the release to be authenticated. Further, plaintiff's Affidavit swears that plaintiff did indeed execute the release on March 3, 2007 despite the date that appears on the release ("8/3/07"). In that context the (3) and (8) are similar in form to the degree that (3) was adopted by plaintiff.

Therefore, defendants are entitled to the presumption that the release is valid. **Fleming v. Ponziani**, 24 N.Y.2d 105. Accordingly, the Court finds that plaintiff has not overcome the presumption of the release's validity as plaintiff has not come forward with sufficient evidence demonstrating fraud in the inducement, mutual mistake or overreaching. The Court also considered that the plaintiff's claim against the AMANTE defendants was highly questionable because of doubtful liability. According to the Police Accident Report, the car that ARNOLD B. AMANTE was driving and in which SEBASTION FRAZZETO was a passenger in was rear-ended after coming to a stop.

The Court notes, however, that plaintiff's release of all claims against the AMANTE defendants does not bar any potential claim by plaintiff for Uninsured Motorist (UM) or Supplemental Underinsured Motorist (SUM) benefits under the insurance policy issued by Progressive to the AMANTE defendants. On the same basis that the plaintiff is accountable under the terms and conditions of the release, Progressive is bound by those same terms, including ambiguity or incompleteness. Since the release fails to address UM or SUM coverage explicitly or implicitly this Court finds that no such coverage was intended to be excluded and, claims thereunder, if any, may be asserted.

Based on the foregoing, it is

ORDERED, that the motion of defendants ARNOLD B. AMANTE and DANIELLE L. AMANTE for an Order dismissing plaintiff SEBASTIAN FRAZZETO's complaint pursuant to **CPLR § 3211** is **granted** except as to the application of UM or SUM coverage.

This constitutes the Order of the Court.

Dated: August 31, 2010


J.S.C.

ENTERED
SEP 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE