

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN Trial Term Part 36  
Justice

NICOLA VOLPE,  <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> YONKERS CONTRACTING COMPANY, INC.,  <p style="text-align: center;">Defendant.</p>	x          x	Index Number <u>33023</u> 2002  Motion Date <u>May 24</u> 2005  Motion Cal. Number <u>1</u>
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The following papers numbered 1 to 5 read on this motion to set aside stipulation of settlement.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmation - Exhibits.....	1
Answering Affirmation - Exhibits.....	2
Replying Affidavit.....	3
Memorandums of Law.....	4-5

Upon the foregoing papers it is ordered that this motion is disposed of as follows:

This is an action brought by the plaintiff, Nicola Volpe, pursuant to the Labor Law to recover for personal injuries. The injuries were sustained in the course of his employment with L & L Painting Co., Inc. on the Williamsburg Bridge Painting Project. On April 6, 2005, the instant action was set down for trial in Part 36 of the Supreme Court, Queens County. Following a conference, the action was settled for Fifteen Thousand (\$15,000.00) Dollars. Thereupon, a stipulation of settlement was spread upon the record in open court. Defendant's attorney stated that the closing papers were to include "an indemnification and hold harmless if there were any liens on the file." Plaintiff's counsel responded that his firm had "checked it out" and there were no liens.

On April 18, 2005 (twelve days after the case was marked settled in court), the plaintiff moved by Order to Show Cause to set aside the stipulation of settlement. The affirmation of plaintiff's attorney states that after the action was settled, his firm received a letter from the New York State Insurance Fund, dated April 12, 2005, with notice of a lien for worker's compensation payments in the amount of Nineteen Thousand Five Hundred and Twenty (\$19,520.00) Dollars and medical benefit payments in the amount of Twenty Eight Thousand One Hundred Thirty Three and 32/100 (\$28,133.32) Dollars. It appears that this letter was sent in response to an inquiry made by the defendant's attorney, who was aware that there might be a substantial workmen's compensation lien.

As a general rule, absent a showing of cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, a stipulation made in open court by plaintiff's attorney is binding upon the plaintiff (Hallock v State of New York, 64 NY2d 224; Davis v New York City Housing Authority, 300 AD2d 531; Siegel v Ocean Park Housing Company, Inc., 248 AD2d 459; Bailey v New York City Transit Authority, 196 AD2d 854). The mistake required to vacate a stipulation of settlement is a mutual mistake which is so substantial that there is no true meeting of the parties' minds (see, Matter of Gould v Board of Education, 81 NY2d 446; Malon v New York City Health and Hospitals Corp., 303 AD2d 725). A unilateral mistake of fact attributable to the negligence of one of the parties does not constitute a basis to rescind a settlement agreement (see, Lowe v Steinman, 284 AD2d 506, 508; Kaplan v Goldbaum, 258 AD2d 620). In the instant case, plaintiff's attorney apparently failed to recognize that a lien had been automatically created by Section 29 of the Workmen's Compensation Law and that oversight led him to conclude there were no outstanding liens. This unilateral mistake is not sufficient to invalidate the stipulation of settlement.

Although the settlement stipulation cannot be set aside based upon mistake, it is not binding upon the plaintiff, Nicola Volpe, unless he authorized his attorney to enter into the settlement. Without a grant of authority from the client, an attorney cannot compromise an action and the settlement will not be binding (see, Hallock v State of New York, supra at 230; Dayho Motel v Assessor of Town of Orangetown, 229 AD2d 435). The plaintiff was not present in court when the settlement of this action was negotiated and the stipulation placed on the record. However, in an affidavit submitted on this motion, the plaintiff has conceded that he did authorize his attorney to accept the settlement of Fifteen Thousand (\$15,000.00) Dollars, but with the understanding that he would receive Nine Thousand (\$9,000.00) Dollars as his share of the

proceeds. The entire settlement amount must be applied to satisfy the outstanding lien of the New York State Insurance Fund and the plaintiff will receive nothing. In addition, since the State Insurance Fund did not consent to the settlement, the plaintiff's right to future worker's compensation and medical benefits will be lost (WCL §29).

Plaintiff's attorney had neither actual nor apparent authority to compromise this action for Fifteen Thousand (\$15,000.00) Dollars, when there was a lien in excess of that amount that would preclude any recovery by the plaintiff. The plaintiff has also promptly moved to set aside the stipulation of settlement, which was entered into in Part 36 after a brief conference and before any trial proceedings had commenced. The defendant's attorney was aware of the likelihood of a substantial worker's compensation lien when the case was settled, and it has not been demonstrated that the defendant relied upon the settlement agreement to its detriment. In light of the foregoing circumstances, which demonstrate an absence of authority from the plaintiff, immediate action to set aside the settlement and lack of prejudice to the defendant, enforcement of the stipulation of settlement against the plaintiff would be unjust and inequitable. In the interest of justice, it is appropriate for the Court to exercise its discretion and relieve the plaintiff, Nicola Volpe, of the terms of the settlement stipulation in this action [see, Weitz v Murphy, 241 AD2d 547; cf. Clark v Bristol-Myers-Squibb & Co., 306 AD2d 82 [stipulation of settlement enforced]].

Accordingly, the motion to set aside the stipulation of April 6, 2005, settling this action, is granted. The action is set down for trial in IA Part 36 on September 6, 2005 at 9:30 AM. The parties are to be prepared to select a jury and proceed with the trial of the action.

Dated: July 12, 2005

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J.S.C.