

Vitarelli v Excel Automatic Tech Center, Inc.

2004 NY Slip Op 30083(U)

April 21, 2004

Supreme Court, Kings County

Docket Number: 0011088/0882

Judge: Michael J. Garson

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 23 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of April, 2004

P R E S E N T:

HON. MICHAEL J. GARSON,
Justice.

-----X

JOSEPH VITARELLI,
Plaintiff,

- against -

Index No. 11088/03

EXCEL AUTOMATIC TECH CENTER, INC.,
Defendant.

-----X

The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1_____
Opposing Affidavits (Affirmations)_____	_____2_____
Reply Affidavits (Affirmations)_____	_____
_____Affidavit (Affirmation)_____	_____
Other Papers <u>Affirmation of Urgency</u> _____	_____3_____

Upon the foregoing papers, defendant Excel Automotive Tech Center, Inc. (Excel), i/s/h/a Excel Automatic Tech Center, Inc., moves, by order to show cause, for an order (1) vacating the stipulation of settlement dated September 17, 2003, which was so ordered by this court on October 9, 2003, and (2) compelling plaintiff Joseph Vitarelli to accept a late answer pursuant to CPLR 3012 (d).

This action arises from a disputed provision in a lease by which Excel rented certain property from plaintiff for a term of approximately six years, from March 1, 1999 to April 29, 2005. The provision at issue, paragraph 61, provided that Excel would have the right to purchase the property from plaintiff for \$950,000 after the completion of the fourth year of the lease, provided that Excel gave notice of its intent to exercise said option to plaintiff and his attorneys by certified mail within 90 days before the end of the fourth year. Excel did not give notice in writing of its intent to purchase the property until October 17, 2003, long after the expiration of such time period. However, paragraph 61 also provided that the tenant may exercise its option to purchase at any time during the lease term if the landlord chooses to sell the property.

Although the record is unclear, it appears that at some point before March 2003 Joke Han (Han), vice-president of Excel, notified plaintiff orally of Excel's intent to exercise the option to purchase. On or about March 19, 2003, plaintiff commenced an action for a judgment declaring that the purchase option provision was removed when the lease was executed, or alternatively that Excel failed to exercise the option in the time period and manner required in the lease. While plaintiff presents a copy of the lease with paragraph 61 crossed out, Excel presents a copy of the lease with paragraph 61 intact. Plaintiff claims that he never received the original lease from the broker who facilitated the transaction. When Excel failed to answer the complaint, plaintiff filed a motion on or about July 24, 2003 to amend the complaint to include the correct name of Excel and for a default judgment against it. Excel asserts that service of process upon the Secretary of State was not effective as

against it because it is named in the caption of the action as “Excel Automatic Tech Center, Inc.” rather than its proper name, “Excel Automotive Tech Center, Inc.” Excel claims that it first saw the summons and complaint when it was served with the motion to amend and for a default judgment, dated July 24, 2003, so it should have additional time to answer the complaint. Plaintiff asserts that since no corporation named “Excel Automatic Tech Center, Inc.” exists, Excel must have received a copy of the summons and complaint from the Secretary of State.

While the above-mentioned motion was pending, the attorneys for each side signed a stipulation of settlement in or about August, 2003. The stipulation originally began with the phrase: “It is hereby stipulated and agreed, by and between the undersigned parties and by their respective counsel...” In the stipulation, Excel agreed that it had no option to purchase the premises, and plaintiff agreed to withdraw its motion and discontinue the action. The document contained signature lines for both parties and their counsel. Excel’s attorney at that time, Meryl Wenig (Wenig), signed the stipulation and sent it via facsimile to plaintiff’s attorneys on August 18, 2003. According to Wenig’s affidavit, plaintiff’s attorneys promptly sent the stipulation back, requesting that Wenig’s client sign it, and requesting that the original signed stipulation be sent back to them. Han refused to sign the stipulation on behalf of Excel. Wenig asserts that one of plaintiff’s attorneys called periodically over the next month to see whether Han had signed the stipulation and was told each time that he had not done so. On or about September 17, 2003, plaintiff’s attorneys filed the stipulation with this court. In the filed stipulation, the word “and” was marked out

of the opening phrase, which now read “by and between the undersigned parties by their respective counsel.” The signature lines for plaintiff and Excel had been crossed out, leaving only the attorneys’ signatures. On October 9, 2003, the stipulation was “so ordered” by this court. On October 10, 2003, plaintiff’s counsel wrote to the court withdrawing the stipulation. However, upon learning that the stipulation had already been so ordered, plaintiff’s counsel informed Excel’s new counsel that she believed the stipulation was enforceable as Ms. Wenig had represented that she was retained by Excel.

In the instant motion, Excel requests that the stipulation be vacated on the ground that the alterations in the stipulation constitute fraud. Plaintiff contends that the signatures of the clients were not required for the stipulation to be valid, and that Wenig possessed at least apparent authority to enter into the settlement on Excel’s behalf.

Stipulations of settlement are enforceable contracts which are favored by courts and not lightly cast aside (*see McKenzie v Vintage Hallmark, PLC*, 302 AD2d 503; *Royal York Realty, Inc. v Ancona*, 280 AD2d 593). Where cause exists sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, courts will relieve a party of the consequences of a stipulation (*Royal York Realty, Inc.*, 280 AD2d at 593). Courts will also afford relief where enforcement of a stipulation “would be unjust or inequitable or permit the other party to gain an unconscionable advantage” (*Bank of New York v Forlini*, 220 AD2d 377, 378).

While the actions of plaintiff’s attorneys in filing the stipulation without defendant’s signature after implying that defendant’s signature was necessary may be underhanded, whether or not the actions were fraudulent depends on whether plaintiff’s attorneys believed


that Wenig had the authority to enter into a settlement on Excel's behalf. If Wenig had at least apparent authority to act for Excel, then her signature on the stipulation can bind Excel to its terms (*see Romantini v Irrgang*, 1 AD3d 268). "A settlement is considered binding, however, even where a client is not present at the time it is entered, and where the attorney does not have actual authority, if the court concludes that counsel's actions indicate 'apparent authority' to act on his or her client's behalf" (*Clark v Bristol-Myers Squibb*, 306 AD2d 82, 84). In *Clark*, the court held that although plaintiff/client refused to sign the settlement agreement, the attorney's signature bound her to it since the attorney had apparent authority to act on the plaintiff's behalf. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*id.*, quoting *Hallock v State*, 64 NY2d 224, 231). If an agent possesses apparent authority, third parties may rely on that authority to the extent such reliance is reasonable (*Hallock*, 64 NY2d at 231).

In the instant matter, it is impossible to determine from the record whether Wenig had apparent authority to enter into the settlement agreement since no information is provided regarding Han's conduct toward third parties. "The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal - not the agent" (*id.*, quoting *Ford v Unity Hosp.*, 32 NY2d 464, 473).

Since such a factual determination cannot be made from the information provided in the record, this motion will be held in abeyance until the issue of whether or not Wenig had apparent authority to enter into the stipulation of settlement, and thus whether a binding settlement was reached, is determined. That portion of defendant's order to show cause dealing with permission to file a late answer will be addressed, if necessary, after such issue is determined.

Pursuant to Article 22 of the Judiciary Law, in accordance with the provisions of Part 122 of the Rules of the Chief Administrator of the Courts (NYCRR Part 122), the issue referred to herein is assigned to the Judicial Hearing Officer in the JHO Part. The date will be fixed by the Clerk of the Part.

The foregoing constitutes the decision and order of the court.


E N T E R,
J. S. C.