

Savitt v Epinard LLC

2004 NY Slip Op 30366(U)

November 30, 2004

Supreme Court, New York County

Docket Number: 604053/02

Judge: Marilyn, J. Shafer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 36

0604053/2002

SAVITT, RICHARD P.
VS
EPINARD LLC

SEQ 1

OTHER RELIEFS

INDEX NO. 604053/02
MOTION DATE 5/27/04
MOTION SEQ. NO. ~~123~~ 001
MOTION CAL. NO. 123

The following papers, numbered 1 to 4 were read on this motion to/for subpoena

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause <u>Memoranda</u> Affidavits Exhibits ...	<u>1 + 2</u>
Answering Affidavits — Exhibits <u>affirmative</u>	<u>3 + 4</u>
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided

per annexed decision

FILED
JAN 04 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/30/04

MARILYN SHAFER
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36**

-----X
RICHARD P. SAVITT and GARY E. LUCIANI,
Plaintiffs,

**Index No.,
604053/2002**

- against -

EPINARD LLC d/b/a MOOMBA,
JEFF GOSSETT and FRANK FALCINELLI,
individually,
Defendants,

-----X
MARILYN SHAFER, J:

The plaintiff Richard P. Savitt (“Savitt”), an attorney represented by his own law firm, The Savitt Law Firm, moves for an order enforcing a settlement agreement (the “Agreement”) and granting such other relief as the Court deems just and proper. In support of the motion, Savitt submits his affirmation and not an affidavit, although he is a named party.

Plaintiff Savitt attaches his “affirmation” in support of the motion. However, as a “party” he is required to submit an “affidavit.” The use of the affirmation can only be by an attorney for the party. CPLR § 2106 states: The statement of an attorney admitted to practice in the courts of the state . . . authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties or perjury, may be served or filed in the action in lieu of and with the same force and effect of an affidavit.

Savitt cannot circumvent Section 2106 in his capacity as a principal of the Savitt Law Firm. Savitt’s submits his affirmation in an effort to demonstrate his burden. Because he is a party, regardless of the fact that he has “retained” his law firm to represent him in this action, the submission of his affirmation instead of an affidavit is improper (*Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801; *Pisacreta v Minniti*, 265 AD2d 540; *Board of Managers of Ocean Terrace Towne House*

Condominium v Lent, 148 AD2d 408, 409).

“Even persons who are statutorily allowed to use affirmations bearing their signatures alone, in lieu of and with same force and effect as an affidavit, cannot do so when they are party to action, although any person who for religious or other reasons wishes to use affirmation as alternative to a sworn statement may do so; however, to be effective, such affirmations must be made before notary public or other authorized official” (*Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799, 799).

Accordingly, the Court will not consider Savitt’s affirmation in support of the motion for an order enforcing the Agreement (*Pisacreta v Joseph A. Minniti, P.C.*, 265 AD2d 540 [attorney and his professional corporation should not have submitted an affirmation by the attorney instead of an affidavit in their effort to demonstrate a reasonable excuse for their delay in answering or appearing and a meritorious defense in a legal malpractice action against them, as the attorney was a party; thus, the affirmation should have been disregarded in resolving the client's motion for leave to enter a default judgment]).

That being said, the Court has considered plaintiffs’ memorandum of law and the attached exhibits to the improper affirmation. Moreover, the Court has considered defendants’ opposition to the motion, that is, the affirmation of defendants’ attorney, Mitchell G. Mandell, and the memorandum of law (see, Mitchell 06/23/004 Affirm., pp 1-3; Memo., of Law, pp 1-4).

Stipulations of settlement are essentially contracts and will be construed in accordance with contract principles and the parties' intent (*Serna v Pergament Distributions*, 182 AD2d 985, 986). Whether a written agreement is ambiguous is a question of law to be resolved by the court (*Van*

Wagner Adv. Corp. v S & M Enters., 67 NY2d 186, 191). Contracts should be enforced in accordance with their terms and “extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face” (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162-163, quoting *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379).

The plaintiff’s exhibits refer to an unsigned copy of the Agreement and numerous electronic mail between the attorneys. None of the exhibits demonstrate a clear and unequivocal agreement to settle the instant litigation involving a dispute over the share of profits, management and ownership of the defunct Moomba-New York bar/restaurant, that was located at 133 Seventh Avenue South, New York, New York, and the Moomba-Los Angeles bar/restaurant located presumably in Los Angeles, California.¹

Defendants’ attorney, who submits a proper affirmation, affirms that there was no signed settlement agreement between the parties (Mandell 06/23/04 Affirm., p 1). The attorney further affirms that the parties had informed the Court that they settled, but that representation was made under the pretext that there was an agreement of all terms (*id.*, p 2, footnote 2).

Moreover, the only documentation submitted by plaintiffs is an unsigned agreement. The claimed settlement never took place in open court (but see, *DeGregorio v Bender*, 4 AD3d 385, 386 [open-court stipulations of settlement are judicially favored, and will not be lightly set aside]). Lastly, the electronic mailings between the party plaintiff Savitt and defendants’ attorney reveal only, if anything, an agreement to agree. Such an agreement would be, at best, an unenforceable agreement

¹ The Complaint is silent as to the location of the Mooba-Los Angeles entity, other than California (see, Verified Complaint, ¶ 27).

(*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 110; *Williamsburg Bus. Park v Brooklyn Navy Yard Dev. Corp.*, 2 AD3d 439).

Accordingly, the motion is denied. The parties are directed to schedule a compliance conference with regard to pending discovery and to finalize a date for the filing of a Note of Issue.

This constitutes the decision and order of the Court.

Dated:

11/30/04


MARILYN SHAFER, J:

FILED
JAN 04 2005
NEW YORK
COUNTY CLERK'S OFFICE