

**Hollander v Fasano**

2006 NY Slip Op 30300(U)

April 21, 2006

Supreme Court, New York County

Docket Number: 0116711/2003

Judge: Joan Madden

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

**PRESENT: HON.           JOAN A. MADDEN            
*Justice***

**PART 11**

ROY DEN HOLLANDER,

**PLAINTIFF,**

**- v -**

WILLIAM R. FASANO, and "JOHN DOE,"

**DEFENDANT.**

INDEX NO. : 116711/03

MOTION DATE: 2/2/06

MOTION SEQ. NO.: 003

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to punish for contempt.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

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NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:     Yes     No

Plaintiff moves for an order finding defendant William R. Fasano ("Fasano") in contempt for his purported failure to comply with the parties' stipulation of settlement of this action which was so-ordered by the court on November 13, 2003 (motion seq. no. 003). Plaintiff separately moves for an order (i) compelling the production of certain non-party discovery, (ii) referring allegations regarding Fasano's former attorney to the First Department's Disciplinary Committee, and (iii) suppressing certain documents previously obtained by subpoena by Fasano's former attorney (motion seq. no. 004).<sup>1</sup> Fasano opposes the motions, which are denied for the reasons below.

<sup>1</sup>Motion seq. No. 003 and 004 are consolidated for disposition.

This action involved a dispute between two tenants residing at 545 East 14<sup>th</sup> Street, in Manhattan, which is part of the apartment complex known as Stuyvesant Town (“the Building”). Plaintiff, who lives in apartment 10-D, complained that Fasano, who lives in apartment 11-D, disturbed him and disrupted his sleep by making a variety of noises after 11:00 pm, including opening and closing doors, and moving and dropping heavy objects, which he described as weights and other work-out equipment. Plaintiff initially commenced an action in the Civil Court of the City of New York seeking \$7,896.50 in damages arising out of the alleged nuisance caused by Fasano in making the noise and to enjoin Fasano’s conduct. The action was settled in mediation before Judge Schwartz pursuant to a stipulation dated June 2, 2003, in which Fasano agreed, *inter alia*, to cease making excessive noise. The parties also agreed to return to mediation on September 9, 2003, unless the parties previously agreed to dismiss the action. However, shortly after the settlement was entered into, plaintiff asserted that Fasano breached the settlement agreement by continuing to make noise.

Plaintiff then moved in this court for an order seeking to (i) preliminarily enjoin Fasano from making the noises, (ii) remove the action to this court from Civil Court, and (iii) amend the complaint to include causes of action for fraudulent misrepresentation and breach of the Civil Court settlement agreement. Fasano opposed the motion and cross moved to dismiss the complaint and for sanctions.

Plaintiff separately moved in this court, by order to show cause, for a temporary restraining order enjoining Fasano from making the complained of noises, to remove the action from Civil Court and to amend the complaint to include causes of action for fraudulent misrepresentation and breach of settlement agreement. Fasano opposed the motion.

On the November 13, 2003 return date of the motions, the parties entered into a stipulation of settlement resolving the action, which was negotiated by the parties through their respective counsel and so-ordered by the court. The stipulation of settlement provides that:

Motion and order to show cause are withdrawn. Defendant Fasano will:

1. Not work out after 11:00 p.m. or before 7:00 a.m. (illegible)...
2. Not make noises—such as dropping weights other equipment or moving heavy objects that disturb other tenants or result in “Founded” complaints.
3. The above is not an acknowledgment that Fasano makes noises or works out.
4. (Plaintiff) agrees not to make unnecessary or unfounded complaints, and the parties agree to cooperate with each other (illegible) quiet enjoyment of their apartments.

If plaintiff has any complaint, he will notify his attorney on a per incident occurrence who will notify (Fasano’s) attorney. And, (plaintiff) also has the right to notify security or any other management, police or other person involved in the building at any time.

The stipulation of settlement did not specify a time period during which Fasano was required to comply with the stipulation, and did not provide for the court’s enforcement of its terms or its continuing jurisdiction over the action. The two grey sheet orders accompanying the motions and cross motion, stated that the motions and cross motion are “permitted to be withdrawn and this action discontinued.”

More than two years after the settlement and discontinuance of the action, plaintiff moved for contempt based on Fasano’s purported violation of the stipulation of settlement. In support of the motion, plaintiff, who is now pro se, submits his affidavit in which he states that “Fasano has blatantly and repeatedly disobeyed the order since September 2005 by lifting weights, dropping weights or heavy objects, slamming metal doors, dragging chairs and heavy objects across the floor, banging kitchen equipment and causing other disturbing, discomforting,

unreasonable, loud and harassing noises after 11 PM at night when most people are trying to sleep in preparation for the next week of work.” He further asserts that Fasano disobeyed the stipulation of settlement the day the order was entered in November 2003 through June 2004, and that the noise only stopped after he threatened to return to court.

In his separate motion to compel, plaintiff seeks documents related to his dispute with Fasano from the non-party Building owner and its managing agent. Plaintiff also seeks to suppress certain documents regarding plaintiff obtained via subpoena from the Building owner by Fasano’s former attorney in 2003, on the ground that plaintiff did not receive notice of such subpoena. Plaintiff further requests that Fasano’s former counsel be referred to the Departmental Disciplinary Committee based on his failure to provide notice of the subpoena.

In opposition, Fasano submits his affidavit in which he states that there is no factual basis for plaintiff’s complaints and that he spoke to the landlord’s Managing Agent, who has no records of any complaints from plaintiff since 2003. Fasano also argues that the motions should be denied given that over two years has elapsed since the action has been settled and discontinued, and the failure of plaintiff to show any reasonable basis for delay.

#### Discussion

The preliminary issue on these motions is whether the court should retain supervisory authority over this action. In general, a settlement which is voluntarily reached and agreed upon terminates an action and no further proceedings may be had in that action. Işaias v. Fischhoff, 37 AD2d 702 (1<sup>st</sup> Dept), appeal after remand, 37 AD2d 934 (1971). That being said, however, a court retains jurisdiction to enforce a settlement agreement unless the settlement results in the discontinuance of the action or the entry of judgment. See Teitelbaum Holdings, Ltd. v. Gold, 48

NY2d 51, 56 (1979); Niagara Mohawk Power Corp. v. Green Island Power Authority, 260 AD2d 849, 850 (3d Dept 1999). Furthermore, an action is not terminated when the settlement agreement indicates an intent that the action will continue if the agreement is not complied with. Legum v. Ruthen, 211 AD2d 701 (2d Dept 1995).

In this case, the stipulation of settlement, together with the grey sheet orders accompanying the motions and cross-motion which stated that the action was discontinued, indicate an intent to terminate the action. Furthermore, the stipulation of settlement provides no role for the court in ensuring compliance with the terms of the settlement and, instead, indicates that any issues regarding such compliance would be resolved through the parties' attorneys and the Building's employees. In fact, as the parties settled the action and plaintiff withdrew his motion to remove the action to the Supreme Court, no determination was made as to whether the action belongs in this court.

Next, even assuming arguendo that the stipulation of settlement did not terminate the action, the court nonetheless may exercise its discretionary authority to refuse to entertain a motion seeking the enforcement of the settlement agreement. See Transportation House, Inc. v. E.D.V. Maintenance Corp., 84 AD2d 534 (2d Dept 1981); Long Island Lighting Co. v. Ambro, 290 AD2d 508 (2d Dept 2002). Under the circumstances of this action, which involves a continuing and evolving dispute between tenants, the court declines to entertain the contempt motion, or to otherwise enforce Fasano's compliance with the stipulation of settlement which was so-ordered more than two years ago and did not contemplate any continuing role for the court. Moreover, plaintiff is not without a remedy as he may commence a new action based on the recent disturbances by Fasano.

The court also notes that although the stipulation of settlement is so-ordered by the court, its provisions are insufficiently precise to constitute "an unequivocal judicial mandate" such that is needed to establish civil contempt. See Gerelli Ins. Agency, Inc. v. Gerelli, 23 AD3d 341 (2d Dept 2005); Muwwakkil v. Metropolitan Suburban Bus Authority, 289 AD2d 309 (2d Dept 2001).

Finally, as the action has been terminated, there is no basis for granting plaintiff non-party discovery, or suppressing certain documents obtained by subpoena in 2003 by Fasano's former attorney. And, any alleged failure by Fasano's former attorney to provide sufficient notice of the relevant subpoena does not provide a basis for referring him to the Disciplinary Committee.

Conclusion

In view of the above, it is

ORDERED that the court declines to exercise its jurisdiction to enforce the terms of the settlement agreement; and it is further

ORDERED that the motion for contempt is denied (motion seq no. 003) ; and it is further

ORDERED that the motion to compel and for other relief is also denied (motion seq. no. 004) .

DATED: April 27, 2006

  
\_\_\_\_\_  
J.S.C.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**FILED**  
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