

Lopez v Celestial Church of Christ, Inc.

2007 NY Slip Op 30490(U)

March 26, 2007

Supreme Court, Kings County

Docket Number: 0046224/2001

Judge: David I. Schmidt

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At an IAS Term, Part SCP 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 26th day of March, 2007.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

-----X

WILFREDO LOPEZ,

Plaintiff,

Index No. 46224/01

- against -

CELESTIAL CHURCH OF CHRIST, INC et ano,

Defendants.

-----X

The following papers numbered 1 to 2 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_____	_____

Upon the foregoing papers, defendant Celestial Church of Christ, Inc. (Celestial Church) moves, by order to show cause, for an order: (1) vacating the judgment entered against it on October 23, 2006 on the ground that plaintiff Wilfredo Lopez (plaintiff) entered said judgment prematurely and in bad faith; (2) setting aside the May 10, 2006 stipulation of settlement entered into by the parties on the ground that plaintiff breached the agreement by entering the judgment; (3) pursuant to CPLR 5240, vacating the restraining notice levied on

JP Morgan Chase Bank (Chase Bank) so as to allow Celestial Church access to its accounts in order to pay its expenses; and (4) prohibiting the sale of the subject property at public auction on December 14, 2006.

Facts and Procedural History

Plaintiff commenced the instant action to recover damages for personal injuries he sustained on December 19, 2000, when he allegedly fell from a scaffold while performing construction work on the property owned by Celestial Church and located at 1380 Jefferson Avenue in Brooklyn. In a decision and order dated November 14, 2002, this court granted plaintiff's motion to enter a default judgment against Celestial Church unless, within 30 days of service of the decision and order with notice of entry, it retained an attorney and served an answer on plaintiff's attorney. Subsequently, in a decision and order dated January 14, 2005, this court granted Celestial Church's motion to vacate the default judgment against it on the condition that it serve an answer within 14 days of the date of said order.

The parties then participated in several conferences in an attempt to settle the case. Eventually, on May 10, 2006, the parties agreed to a stipulation of settlement¹, so-ordered by the court and signed by the parties, which provided for settlement under the following terms:

- (1) For the sum of \$125,000.00.
- (2) Church agrees to place an application for a mortgage in the amount of \$300,000.00 within thirty days of today's date; in event that the

¹ Justice Schmidt was present at the May 10, 2006 settlement conference which was held at the subject property.

mortgage application is obtained, payment shall immediately be made to plaintiff and his attorney David Broderick, PC at 70-20 Austin Street Forest Hills, New York in the amount of \$125,000.00.

- (3) If the mortgage application is rejected, then the church shall begin paying the sum of \$125,000.00 over a period of 24 months commencing ninety days after receipt of rejection notice until such time as the judgment is satisfied.
- (4) Payments shall be due on the 1st of the month but there shall be a five day grace period. In the event payment is not made by end of grace period, then upon five days notice to attorney for defendant Michael C. Posner by fax at 212 216-9049 and to Al T. Adeluwoye at 718 287-4315 and default is not cured within [five] days thereafter, then the plaintiff can enter a judgment [without] further notice of \$250,000.00 based upon affidavit detailing default.
- (5) All signatories on behalf of the Church are signing in their capacities as Church officers and shall not be personally liable.

It is undisputed that Celestial Church did not obtain a mortgage within the requisite time period provided for under the settlement agreement. Counsel for Celestial Church² sent a letter dated September 25, 2006 to plaintiff's counsel informing him that Chase Bank had declined to extend a mortgage loan to Celestial Church. Annexed to the letter was a copy of the August 29, 2006 declination letter from Chase Bank. In the letter, Celestial Church further stated that it then had ninety days from the date of the August 29, 2006 communication from Chase Bank to commence payment of the settlement amount of \$125,000.00.

Plaintiff then responded by letter dated September 27, 2006, noting that Celestial Church had applied for a business line of revolving credit, as referred to in the August 29,

² In its moving papers, Celestial Church submits a copy of the August 29, 2006 letter from Chase Bank declining its request for a business revolving credit loan.

2006 letter from Chase, rather than applying for a mortgage, as required under the stipulation of settlement. As such, plaintiff claimed that Celestial Church was in default of the stipulation of settlement and also stated that a judgment would be entered against “Celestial Church and the property in the amount of (\$250,000.00) plus interests and costs” if his counsel did not receive “an initial, good faith payment in the amount of five thousand dollars” by 5:00 P.M. on Friday, October 6, 2006.

Shortly thereafter, by letter dated October 3, 2006, plaintiff declared to Celestial Church that it was in default of the stipulation of settlement and that it had five days to tender the amount due under the stipulation or else a judgment for \$250,000.00 would be entered against it.

Subsequently, by letter dated October 10, 2006, plaintiff again declared to Celestial Church that not only was it in default of the settlement agreement but also that it had failed to make the payment due and owing on October 1, 2006 and, as such, it had five days to cure the default or a judgment would be entered against it for \$250,000.00 plus interests and costs. Finally, on October 26, 2006, plaintiff entered a judgment of \$250,000 plus interest against Celestial Church.

Thereafter, on December 6, 2006, Celestial Church moved, by order to show cause, for an order seeking the relief requested herein. The order to show cause was signed by this court on December 6, 2006 and included the following language:

“[Ordered] that pending the hearing of this motion, (a) Plaintiff is temporarily restrained from seeking to enforce the Judgement ... (c) City Marshall, Gregg

E. Bienstock, Badge No. 17, is temporarily enjoined from conducting the Sale at Public Auction scheduled to be held on December 14, 2006 at 9:00 a.m.”

The order to show cause permitted service of the order to show cause, by fax, upon plaintiff’s counsel on or before December 6, 2006 and further provided that any opposition papers were to be personally served upon counsel for Celestial Church “by no later than 5:00 p.m. on December 6, 2006.”

By short form order dated December 21, 2006, this court reserved decision on the instant motion and “[ordered] that the judgment shall continue to remain in force and effect against [Celestial Church] and its real properties” and further “[ordered] that the Bank account of [Celestial Church] at Chase Bank, levied upon by the Marshall, shall be available to [Celestial Church] provided that there is a balance of \$10,000 which shall be retained for judgment ...”

Discussion

In support of the motion, Celestial Church submits the affidavit of Olubayo Olasokan (chairman of Celestial Church). In his affidavit, Mr. Olasokan avers that Celestial Church applied for a loan from Chase Bank in order to pay the settlement amount to plaintiff but that its application was denied on August 29, 2006. Celestial Church maintains that upon denial of its loan application on August 29, 2006, it then had ninety days until November 27, 2006 to make the first payment of the settlement in accordance with the terms of the stipulation. Celestial Church further asserts that, under the terms of the stipulation, the first payment was

then due on December 1st, 2006 (the first day of the month), after which a five day grace period would apply, thus permitting an extension of the deadline for payment of the first installment to December 6, 2006.

According to Mr. Olasokan, on December 5, 2006, Celestial Church discovered that its account with Chase Bank was frozen due to plaintiff's service of a restraining notice in accordance with the entry of the October 23, 2006 judgment. Celestial Church contends that plaintiff was not entitled to enter the judgment until after it had defaulted in the payment of the first monthly installment. Mr. Olasokan further attests, in his affidavit, that Celestial Church tendered the first payment of \$5,208.33 to plaintiff's counsel, by hand delivery, on December 6, 2006, and insists that Celestial Church is in full compliance of the stipulation of settlement.

Additionally, Celestial Church asserts that plaintiff's entry of the judgment was in breach of the stipulation of settlement and amounts to an anticipatory breach. In this regard, Celestial Church argues that the court should vacate the judgment, set aside the stipulation of settlement and, upon so doing, restore the instant action to the trial calendar. Finally, Celestial Church contends that the restraining notice served upon Chase Bank should be vacated pursuant to the principles of equity and CPLR 5240 and that the Marshall should be enjoined from proceeding with the sale of the subject property.

In opposition,³ plaintiff contends that Celestial Church breached the stipulation of settlement by failing to apply for a mortgage (or submit any proof thereof) in the amount of \$300,000.00 within thirty days of signing the stipulation or to promptly notify his counsel of its inability to do so. Plaintiff points out that instead of applying for a mortgage, as provided for in the terms of the stipulation of settlement, Celestial Church applied for a revolving business line of credit which plaintiff claims Mr. Olasokan should have been aware was not offered by Chase Bank because he worked at the branch where the credit application was placed.

In response to Celestial Church's assertion that it had ninety days from the August 29, 2006 letter from Chase Bank to commence making the installment payments, plaintiff counters that Celestial Church's breach precluded the ninety-day period from even starting. In the alternative, plaintiff argues that if the ninety-day period does apply at all, it would have commenced on June 9, 2006, thirty days after the signing of the stipulation, and ended on September 7, 2006. Plaintiff claims that it did not enter the judgment against Celestial Church until October 23, 2006 and that it had sent three prior letters to counsel for Celestial Church stating that it was in default of the stipulation of settlement and demanding payment

³ The court notes the assertions of plaintiff's counsel in his affirmation with respect to service of opposition papers by 5:00 P.M. on December 6, 2006 when his office received the faxed copy of the order to show cause at 4:48 P.M. on the same date. Nevertheless, the court will consider the submissions by both parties in deciding the instant motion.

of the settlement amount. Plaintiff asserts that despite these notices, Celestial Church never requested an extension of time to make a payment.

According to counsel for plaintiff, Celestial Church's prior counsel contacted him in an effort to resolve the matter. Plaintiff's counsel states in his affirmation that he required that any arrangements be concluded by 5:00 P.M. on November 17, 2006 or the matter would be turned over to the Marshall for enforcement. Plaintiff's counsel was then informed by Celestial Church's counsel that he was being substituted by new counsel. Plaintiff questions the validity of the averments in Mr. Olasokan's affidavit and argues that the affidavit submitted by his current counsel left sufficient space on the page above his signature to allow for the insertion of changes. Additionally, plaintiff maintains that the draft tendered by Celestial Church on December 6, 2006 was not in good faith because it was drawn against an account with frozen funds. Finally, plaintiff maintains that the stipulation of settlement is an enforceable contract and, as such, the court should reinstate the restraining order and direct Celestial Church to produce an accounting of the moneys expended from the time the restraining order was lifted until the time that the order is reinstated.

A so-ordered stipulation is a contract between the parties thereto and will be construed in accordance with contract principles and the parties' intent (*Charter Realty & Development Corp. v New Roc Associates, L.P.*, 293 AD2d 438 [2002]; *Serna v Pergament Distribs.*, 182 AD2d 985 [1992], 986, lv dismiss 80 NY2d 893 [1992], rearg den 80 NY2d 926 [1992]). Furthermore, stipulations of settlement are favored by the courts, are not lightly set aside, and

will generally be enforced (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Matter of Galasso*, 35 NY2d 319, 321 [1974]). When an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 163 [1990]). Accordingly, a court “should not, under the guise of contract interpretation, ‘imply a term which the parties themselves failed to insert’ or otherwise rewrite the contract” (*see Aivaliotis v Continental Broker-Dealer Corp.*, 30 AD3d 446 [2006]; *Lui v Park Ridge at Terryville Assn., Inc.*, 196 AD2d 579, 581 [1993], quoting *Mitchell v Mitchell*, 82 AD2d 849 [1981]).

Based upon a review of the record submitted by the parties, the court notes that it is evident from the August 29, 2006 letter from Chase Bank that Celestial Church submitted a “Business Credit Application” for \$250,000 that was denied. There is no indication, however, that Celestial Church ever applied for a mortgage in the amount of \$300,000 within the time period provided for under the stipulation. However, the stipulation of settlement is silent on the issue of what is to occur if Celestial Church does not apply for a mortgage within the requisite time period. The stipulation of settlement merely addresses, *inter alia*, what would occur if Celestial Church’s mortgage application is rejected, sets up an instalment payment schedule and provides for the steps to be taken by plaintiff in the event that Celestial Church defaults in making payments subsequent to the rejection of its mortgage application.

Here, Celestial Church contends that its tender of payment in the amount of \$5,208.33 to plaintiff's counsel on December 6, 2006 is in accordance with the time period specified by the stipulation of the settlement but that plaintiff's entry of the October 23, 2006 judgment was in breach of the agreement and constitutes an anticipatory breach. As such, Celestial Church maintains that the stipulation of settlement should be set aside and the action be restored to the trial calendar. On the other hand, plaintiff argues that Celestial Church breached the stipulation of settlement by failing to apply for a mortgage within thirty days of its signing and failed to comply with its terms despite receiving three letters notifying it of its default therefore justifying entry of the judgment in the full amount of \$250,000.

In the instant case, where the stipulation of settlement is silent as to what is to occur if Celestial Church fails to apply for a mortgage, the contract is ambiguous. Whether an agreement is ambiguous is a question of law for the courts (*see Kass v Kass*, 91 NY2d 554, 566 [1988]; *Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 191 [1986]). A contract is ambiguous when it is open to various interpretations (*see Davis v Dodge*, 126 AD 469 [1908]). Ambiguity is determined by looking within the four corners of the document, not to outside sources (*see W.W.W. Assocs.*, 77 NY2d at 162-163). In making such a determination "courts 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over

substance and a sensible meaning of words should be sought (“*Kass*, 91 NY2d at 566, ✓ quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]).”

In light of the foregoing, the court rejects the interpretation and argument set forth by both parties. The stipulation of settlement does not allow for entry of the judgment in the event that Celestial Church fails to apply for a mortgage. Furthermore, there is an absence of “fraud, collusion, mistake, or accident” to warrant setting aside the stipulation of settlement as requested by Celestial Church (*Hallock*, 64 NY2d at 230). Celestial Church failed to apply for a mortgage and instead opted to apply for a business credit application which was ultimately rejected.

Accordingly, Celestial Church’s motion is granted to the extent that the October 23, 2006 judgment is vacated; its Chase Bank account shall remain accessible in accordance with the December 21, 2006 order of this court; and the sale of the subject property by the Marshall is cancelled. However, that branch of Celestial Church’s motion to set aside the stipulation of settlement is denied. Celestial Church is ordered to follow the terms of the stipulation of settlement immediately as if the mortgage application had been denied and shall pay the sum of \$125,000.00, plus nine percent interest, over a period of 24 months commencing on the first of JUNE. Nine percent interest will be applied to the total amount to be paid to plaintiff from the time Celestial Church was to commence making payments on December 1, 2006 (ninety days plus the five days grace period after the August

29, 2006 letter from Chase Bank) until the time when it actually makes its initial payment to plaintiff.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT