

Harvey v Two Bros. Gen. Contr. Corp.

2007 NY Slip Op 31102(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0108844/2001

Judge: Eileen A. Rakower

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SCANNED ON 5/8/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EILEEN A. RAKOWER**
J.S.C.

PART **Part 5**

Index Number : 108844/2001

HARVEY, NATHANIEL

vs

TWO BROTHERS GENERAL

Sequence Number : 002

VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/1/07



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

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: PART 5

-----X
NATHANIEL HARVEY,

Plaintiff,

Index No.
108844/01

- against -

Decision and Order

TWO BROTHERS GENERAL CONTRACTING CORP., THE
OLNICK ORGANIZATION, INC., THE LENOX TERRACE
DEVELOPMENT ASSOCIATES, INC.,

Defendants.
-----X

HON. EILEEN A. RAKOWER

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff brings this motion to vacate its settlement order dated March 20, 2006, pursuant to CPLR § 5015(3), or in the alternative, to have the court direct defendant Olnick's insurance fund, the Superintendent of Insurance of the State of New York as Administrator of the Property/Casualty Insurance Fund to pay the plaintiff the agreed upon settlement amount immediately.

Nathaniel Harvey appeared before this Court on March 16th, 17th, and 20th 2006 for the trial of his personal injury action. Mr. Harvey had the opportunity to testify and he presented the testimony of Otis Brooks and Doctor Shearwood J. McClelland. Plaintiff rested his case, at which time, the parties entered into a stipulation of settlement on the record. While there was discussion at the time of the settlement regarding the New York State Insurance Department, Liquidation Bureau being exempt from the prompt payment rule under CPLR § 5003-a(f), it was acknowledged that best efforts would be made to effect prompt payment.

Payment was never made on the stipulation of settlement entered into on the record on March 20, 2006. The stipulation itself is the agreement between the parties. Plaintiff appends a copy of the minutes of that stipulation to his reply. No other writing between the parties was prepared which would serve to represent the agreement. The Court acknowledges that plaintiff has appended a written stipulation unsigned. Also, the affidavit of Mark LoBiondo admits that he authorized the settlement in the sum of \$51,000. Mr. LoBiondo reports that a written stipulation of

settlement was prepared, but further negotiations regarding a certain paragraph in the stipulation broke down, and it was never fully executed. There is no dispute that the stipulation of settlement entered into on the record is binding, and the attorneys had the authority to so bind the parties.

Plaintiff moves to vacate the judgment, not appended to the papers, on the grounds of fraud, misrepresentation, or other misconduct of an adverse party. Defendant opposes, and argues that such relief is only available through a plenary action.

The settlement itself contains discussion among the parties which includes:

Mr. Cooper (Plaintiff's counsel):

Your Honor, I would only want to understand the maximum amount of time that this process might take and if Mr. Duignan does this on a regular basis, he ought to be able to give myself and the Court some idea of what we are talking about here in terms of payment to the plaintiff in exchange for the settlement.

Mr. Duignan (Defendant's counsel):

I don't know. I don't get involved with the payment but I know it is subject to their rules and it takes a longer period of time for payment but you do get the payment. That's all I can tell you.

(Whereupon, a discussion was held off the record.)

The Court:

On the record, obviously it would be a reasonable amount of time but you are saying, Mr. Duignan, reasonableness should be considered in light of this additional step that has to be taken because it is a liquidated company.

Mr. Duignan:

All of these cases that are settled through the Liquidation Department follow these rules. They have their own stipulation of discontinuance, they have their own releases and that goes out not from my office but directly from the Liquidation Bureau.

The Court:

And it is your understanding or experience that this should take approximately six months?

Mr. Duignan:

That's my understanding.

Mr. Cooper:

I would only add, you Honor, that from my client's point of view, the settlement is subject to receipt of the settlement funds within a reasonable period of time which we are told should be no greater than six months at this point, your Honor. Should we not receive those funds, I would like the opportunity to apply to the Court to, if necessary, retry in case, your Honor.

The Court:

I think that's reasonable.

To date, in excess of one year has gone by and a settlement check has not been tendered. Plaintiff reserved his option to move this court to vacate the settlement so that he could retry his case in the event no payment was made. While the court is mindful that this would mean additional expenses on plaintiff's part, and while any judgment would be subject to delay in collection because of the liquidation of the insurer, and despite the age of the plaintiff, the motion is granted. Plaintiff has demonstrated a misrepresentation, while not wilful, which induced plaintiff to agree to the settlement terms.


Wherefore, it is hereby

ORDERED that the stipulation of settlement entered into on March 20, 2007 is vacated; and it is further

ORDERED that this matter be restored to the trial calendar and given a trial preference in light of plaintiff's age; and it is further

ORDERED that plaintiff is to serve a copy of this order upon trial support (Room 158).

Dated: May 1, 2007


Eileen A. Rakower, J.S.C.

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE