

**Centennial Ins. Co. v Tadco Constr. Corp.**

2007 NY Slip Op 32794(U)

August 22, 2007

Supreme Court, New York County

Docket Number: 0603713/2004

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 603713/2004

CENTENNIAL INSURANCE

vs

TADCO CONSTRUCTION

Sequence Number : 011

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE 7/13/07

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION...

**FILED**

SEP 04 2007

HON. RICHARD B. LOWE, III

Dated: 8/22/07

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X

CENTENNIAL INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 603713/04

TADCO CONSTRUCTION CORP., D&D MASON  
CONTRACTORS, INC., FRANK DEMARTINO and  
THOMAS DEMARTINO,

Defendants.

-----X

TADCO CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

**FILED**

SEP 04 2007

Third Party Index No.  
590436/06

RABINOWITZ & GALINA, MICHAEL ROY  
GALINA and MICHAEL RABINOWITZ,

COUNTY CLERK'S OFFICE  
NEW YORK

Third-Party Defendants.

-----X

**Hon. Richard B. Lowe, III:**

Plaintiff Centennial Insurance Company ("Centennial") moves pursuant to CPLR 2221 for leave to reargue this court's order of March 14, 2007 which prevents plaintiff from serving restraining notices on a non-party in order to enforce a judgment against defendant Tadco Construction Corp. ("Tadco") and, upon reargument, vacating said order. Centennial also moves pursuant to CPLR 2221 for leave to renew the same order on grounds of newly discovered facts.

**Background**

On August 30, 2005, a default judgment in the amount of \$219,303.03 was entered

against the defendants in this action. In order to collect the judgment, plaintiff served restraining notices upon non party Dormitory Authority of New York ("Dormitory Authority"). This resulted in a Stipulation of Settlement ("Stipulation") being reached between Centennial and Tadco dated January 30, 2006. Under the Stipulation, the restraining notices were withdrawn in exchange for a Deed in Lieu of Foreclosure to a piece of real property owned by defendant Joseph DeMartino (the "Deed"). The Deed provided security to enforce the remainder of the agreement which called for DeMartino to produce an affidavit attesting to the following:

- a. That he shall cause to be given to Plaintiff an irrevocable letter of credit to secure the judgment, in the amount of \$194,000.00 on or before March 3, 2006;
- b. That in the alternative to the above, that he shall tender cash payments to the Plaintiff in the sum of \$194,000.00 as follows: the sum of \$64,666.67 on or before March 10, 2006; the sum of \$64,666.67 on or before April 10, 2006; and the sum of \$64,666.67 on or before May 10, 2006 (*Exhibit D, Notice of Motion, p. 3*)

The Stipulation also provides that if DeMartino complies with these terms, the plaintiff will return the Deed and the plaintiff will file a stipulation of discontinuance. It further provides:

STIPULATED and AGREED, that upon Defendants' compliance with the terms and provisions of this Stipulation, Plaintiff shall take no further steps to enforce its judgment as against Defendants; and it is further

STIPULATED and AGREED, that in the event of Defendants' default and failure to cure, Defendants individually and/or in their corporate capacities and/or their father, Joseph DeMartino will fully cooperate in executing any additional documents needed attendant to Plaintiff's recording of the Deed in Lieu [of Foreclosure] . . . (*Exhibit D, Notice of Motion, p. 3*).

In a letter dated April 6, 2006 the parties amended the Stipulation to extend the deadlines

for making the installment payments. Incorporating all the terms of the Stipulation, the letter also re-iterates that no further steps to enforce the judgment would be taken subject to DeMartino making the required payments. The letter also re-iterates that Plaintiff may file the Deed in the event that Tadco defaults under the Stipulation and subsequent letter. DeMartino did not make the requested payments and Tadco defaulted under the Stipulation.

In an order dated March 14, 2007, this court ruled that under the terms of the Stipulation and letter, Centennial's sole remedy upon Tadco's failure to comply with its terms was to file the previously tendered Deed and to pursue its remedies in connection therewith. In support of its motion to reargue, the plaintiff argues that its sole remedy is not to file the Deed, but that it may continue to enforce the judgement by filing additional restraining notices with DASNY.

In support of the motion to renew, Centennial argues that the denial of Tadco's motion to vacate a judgment against it in *Racanelli Construction Co, Inc. v Tadco* (Index No. 11791/03) for which judgment was assigned to Centennial, is significant because it affirms Tadco's liability. Therefore, this new fact, according to Centennial, is grounds for renewal.

### **Discussion**

#### **Motion to reargue**

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion" (*CPLR 221(d)(2)*). A motion for re-argument addressed to the discretion of the court is designed to afford a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied any controlling principle of law; its purpose is not to serve as a vehicle to permit the unsuccessful party to argue,

once again, the questions previously decided (*See, William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992], *lv to app dismissed in part, den. in part*, 80 NY2d 1005 [1992].)

The plaintiff argues that the court's interpretation of the Stipulation is misconstrued and has the effect of leaving much of the terms of the Stipulation meaningless. Specifically, it argues that if the Stipulation is interpreted to mean that Centennial relinquishes its rights to enforce its judgment solely upon the receipt of the Deed because the Deed served as alternative collateral, then the entire remainder of the Stipulation is surplusage.

“[C]ontracts should be construed to give force and effect to their provisions and not in a manner so as to render them meaningless (*Yoi-Lee Realty Corp. v 177<sup>th</sup> Street Realty Associates*, 208 AD2d 185, 190 [1st Dept 1995])(internal citations omitted). An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation (*Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191, 196 [1st Dept 1995]). “It is a recognized ‘rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract . . . without force and effect (*Ruttenberg* at 196).

Centennial argues the paragraph which reads “STIPULATED and AGREED that upon defendants’ compliance with the terms and provisions of this Stipulation, Plaintiff shall take no further steps to enforce its judgment against defendants” creates a condition precedent whereby compliance by defendant with the Stipulation only will preclude Centennial’s enforcement rights. Therefore, according to Centennial, because Tadco defaulted under the stipulation, Centennial has maintained its rights to enforce the judgement.

However, Centennial’s interpretation negates many of the other terms of the Stipulation.

The Stipulation specifically states, that it is “STIPULATED and AGREED that the Defendants will collateralize Plaintiff’s judgment and Plaintiff will refrain from executing thereon . . .” . (*Exhibit D, p.2*). It then goes on to articulate the terms of the collateralization which is intended to secure Centennial’s rights of collection. Under the terms, the Plaintiff is to hold the Deed and the Defendant is given the opportunity to either submit a letter of credit or make the required payments. In the event the Defendant does not do either, then in the event of a default, “Plaintiff shall be immediately entitled to file the Deed in Lieu of Foreclosure and may pursue any and all of its remedies in connection therewith” (*Exhibit D, Notice of Motion, p. 3*). The following paragraph further states that upon default, “DeMartino will fully cooperate in executing any additional documents needed attendant to Plaintiff’s recording of the Deed in Lieu [of Foreclosure]” (*Id*). To interpret the contract as Plaintiff urges this court would negate the terms of the filing of the lien as well as the earlier cited paragraph whereby Plaintiff agrees that “Defendants will collateralize Plaintiff’s judgment and Plaintiff will refrain from executing thereon . . .”( *Exhibit D, Notice of Motion, p. 2*).

When read as a whole, it is clear that the parties intent was that the Deed would serve to collateralize the judgment. The parties agreed that in exchange for Plaintiff foregoing executing on the judgment, DeMartino would make certain installment payments. In the event the payments were not made, then Plaintiff became entitled to file the deed in satisfaction of the judgment.

This interpretation is reasonable and in accordance with the parties intent. Indeed, the parties do not dispute that the property is valued at over \$500,000.00 and secures the approximate \$200,000 judgment. Plaintiff’s sole remedy is to file the lien and begin formal

eviction proceedings. Centennial has argued that this interpretation of the Stipulation is incorrect because “[u]nfortunately Centennial was wrong in its position [that the filing of the lien] would be a sufficient threat, in terms of enough enforcement that the threat of this enforcement would result in actual money, because the deed itself has not resulted in actual money until yet more attorneys fees are expended” (*Transcript, March 14, 2007, p. 6, lines 18-24*). In the instant motion, Centennial submits affidavits affirming to its inability to immediately sell the property and the need to pursue eviction proceedings. Despite Centennial’s apparent dismay that it will expend more time collecting on its judgment through sale of the property, this court cannot undo the bargain that was made and must enforce the terms of the Stipulation.

Furthermore, there is no dispute that the single purpose of the stipulation was to enable Tadco to be free from restraints on its funds and to continue to do business. Therefore, it turned over the Deed as collateral which represents property agreed to be worth twice as much as the judgment which is to be turned over in the event Defendant does not make the stipulated payments. Plaintiff received this Deed and agreed to forgo its right to execute the judgment. This understanding is made evident through the terms of the stipulation.

It is for these reasons that the motion to reargue is denied.

The court does note that Defendant may have breached the Stipulations covenant of good faith and fair dealing. The Plaintiff urges this court to issue an order to a sheriff commanding the Defendants to vacate the premises. This relief goes beyond that requested in the Notice of Motion. However, it is an application the court will consider upon proper notice.

*Motion to renew*

Defendant argues that renewal is proper since subsequent to this Court’s decision, the

court in Suffolk County denied Tadco's motion to vacate the settlement on the record and the judgment entered against Tadco, which judgment was assigned to Centennial . The defendant does not explain how this new fact affects the decision of this court which was made in March 2007. It appears to argue that the decision lifts an obligation of Centennial to forebear judgment because Tadco appears to have settled the Suffolk County lawsuit. In fact the decision seems to enforce the monies for which Centennial is now seeking to recover from Tadco. However, it does not change the means by which it may recover which is determined by the Stipulation. Therefore, the motion to renew is denied.

**Conclusion**

Therefore, based on the foregoing, it is hereby

ORDERED the motion to reargue is denied and it is further

ORDERED the motion to renew is denied.

This shall constitute the Order and Decision of the Court.

Dated: August 22, 2007

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III

**FILED**  
SEP 04 2007  
NEW YORK  
COUNTY CLERK'S OFFICE