

**Blank v Two Italians & A Latina Corp.**

2007 NY Slip Op 33156(U)

September 26, 2007

Supreme Court, New York County

Docket Number: 0101351/2006

Judge: Martin Shulman

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

Index Number : 101351/2006

**MARTIN SHULMAN**  
J.S.C.

**BLANK, BRIAN**

vs.

**TWO ITALIANS & A LATINA**

SEQUENCE NUMBER : 002

MONEY JUDGMENT

PART 1

INDEX NO. 101351/076

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

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

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

	PAPERS NUMBERED
Notice of Motion/ <del>Order to Show Cause</del> — Affidavits — Exhibits <u>A-C</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A+B</u>	<u>2</u>
Replying Affidavits <u>+ 900 A+B</u>	<u>3</u>


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
OCT 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: September 26, 2007

  
\_\_\_\_\_  
**MARTIN SHULMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 1

-----X  
BRIAN BLANK,

Plaintiff,

Index No. 101351/06

-against-

TWO ITALIANS & A LATINA CORP.,  
TWO ITALIANS & A LATINA CORP. d/b/a  
HEAVEN and HEAVEN,

Defendants.

DECISION/ORDER

**FILED**

OCT 03 2007

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. MARTIN SHULMAN, J.S.C.:

In the instant action plaintiff, Brian Blank ("plaintiff" or "Blank"), moves for an order entering judgment against defendants in the amount of \$4,000.00 plus costs and disbursements and interest from July 17, 2005 and for sanctions. Alternatively, the motion requests that the case be restored to the calendar for the completion of discovery. Defendants Two Italians & a Latina Corp. and Two Italians & a Latina Corp. d/b/a Heaven and Heaven ("defendants") oppose the motion to enter judgment and for sanctions, but consent to the alternative relief of restoring the case to this court's compliance conference calendar.

At a March 13, 2007 compliance conference, counsel for the parties agreed to settle this action for the sum of \$4,000.00 and the matter was marked settled and entered by the clerk into the court's calendar. Thereafter, by letter dated March 19, 2007, plaintiff's counsel forwarded defendants' counsel a stipulation of discontinuance and duly executed general release. Ruiz Aff. in Supp. at Exh. A. Despite several follow up telephone calls to defendants' counsel, including counsel's representation that

defendants were sending a check, defendants have failed to tender the agreed upon sum to Blank. This motion ensued.

Defendants do not dispute that an oral settlement of this action was agreed to before the court on March 13, 2007. Defendants submit an affidavit from Theresa Bavaro ("Bavaro"), their manager, who concedes defense counsel called her from court on March 13, 2007, at which time she authorized settlement for \$4,000.00. Ehrlich Aff. in Opp. at Exh. A, ¶3. However, in mid-April 2007 after Blank's counsel forwarded the settlement documents to defendants' counsel, Bavaro advised defendants' attorney that she "needed to review the settlement documents with the defendants' principal partners." *Id.* On July 5, 2007, over three months after agreeing to settlement, Bavaro advised defendants' counsel that the principals did not wish to settle the case and she lacked authority on March 13, 2007 to settle the matter because she had not spoken with them at that time. *Id.* at ¶5. In opposition to Blank's motion, defendants argue that the oral agreement is not binding since it was not spread upon the record in "open court" or otherwise "recorded in a traditional court record".

### Discussion

CPLR 2104 reads:

An agreement between parties or their attorneys relating to any matter in an action, **other than one made between counsel in open court**, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. (Emphasis added).

"The term 'open court' refers to a judicial proceeding in a court, whether held in public or private, and whether held in the court house, a courtroom, or any place else, so long

as it is, in an institutional sense, a court convened . . . to do judicial business.” *Matter of Dolgin Eldert Corp. v. Dolgin*, 31 N.Y.2d 1, 4-5, 334 N.Y.S.2d 833 (1972). It “refers to the formalities attendant upon documenting the fact of the stipulation and its terms, and not to the particular location of the courtroom itself...” *Popovic v. New York City Health & Hospitals Corp.*, 180 A.D.2d 493, 579 N.Y.S.2d 399, 400 (1<sup>st</sup> Dept., 1992).

Absent an executed settlement agreement between the parties or their counsel, such formalities should, *inter alia*, include the court documenting the terms of the oral settlement agreement and making an entry of the settlement into its computer records (*Popovic, supra*).<sup>1</sup> Making an entry of the settlement in the court’s minute book of an “open court” proceeding also formalizes the agreement. *Collazo v. New York City Health & Hospitals Corp.*, 103 A.D.2d 789, 790, 477 N.Y.S.2d 662, 663 (2<sup>nd</sup> Dept., 1984).

Defendants’ counsel’s disavowal of the settlement agreement entered into at the March 19, 2007 court conference is not well received. It is simply incredible for defendants’ counsel to contend the oral agreement made before this court is unenforceable when his own correspondence to his clients acknowledges the validity of the agreement by requesting defendants forward payment in the amount of \$4,000.00 made payable to Blank’s counsel and warning that judgment may be entered upon their default. Ehrlich Aff. in Opp. at Exh. B. Unfortunately, defendants have placed their

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<sup>1</sup> In *Popovic, supra*, the Appellate Division, First Department ruled such court action to sufficiently constitute compliance with 22 NYCRR §202.26 (f) which states: “If an action is settled...at a pre-trial conference, complete minutes of such stipulation shall be made at the direction of the court. Such transcribed stipulation shall be enforceable as though made in open court. “

counsel in the unenviable position of risking his credibility with his adversary and the court by belatedly contending that Bavaro lacked authority to authorize the March 19, 2007 settlement.

It is well settled that stipulations of settlement are favored by the courts and are not lightly cast aside. *Hallock v. State of New York*, 64 N.Y.2d 224 (1984). A stipulation made by counsel in open court may bind his client even where it exceeds counsel's actual authority. *Id.* A stipulation of settlement is made in open court if the parties agree to the exact amount in the presence of the court and the Clerk of the Court makes the appropriate entries. *Popovic, supra.*

The court finds that the oral settlement is in all respects valid and binding. The terms of the oral agreement are not disputed and its terms were adequately memorialized in the court's computerized markings. *Popovic, supra; Hawkins v. City of New York*, 40 A.D.3d 327, 833 N.Y.S.2d 894, 895 (1<sup>st</sup> Dept., 2007)(requirements of CPLR 2104 were met when court clerk updated the court card to read "settled before trial" and marked the case "disposed" in the court's records); *Golden Arrow Films, Inc. v. Standard Club of California, Inc.*, 38 A.D.2d 813, 814, 328 N.Y.S.2d 901 (1<sup>st</sup> Dept., 1972)(no dispute that full agreement was reached and no dispute as to terms). At no time was there any representation that the settlement was subject to further approval. Nor did defendants promptly notify plaintiff of its objections to the settlement. See *Hawkins, supra* (plaintiff implicitly ratified settlement by making no formal objection for nearly seven months after being told about it). Therefore, it is undeniable that defendants' counsel was cloaked with apparent, if not actual authority, when he entered into the oral stipulation of settlement. *Hawkins, supra*, 833 N.Y.S.2d at 895.

As defendants have failed to tender prompt payment after settlement, plaintiff is entitled to entry of judgment pursuant to CPLR §5003-a (e) and the motion is granted accordingly. The portion of Blank's motion seeking the imposition of sanctions is denied. While defendants have acted in extreme bad faith, the court, in its discretion, declines to impose sanctions.


ORDERED that plaintiff's motion is granted, with costs, to the extent that the New York County Clerk is directed to enter judgment in favor of plaintiff Brian Blank and against defendants in the amount of \$4,00.00, with interest as calculated by the Clerk at the rate of 9% per annum from March 19, 2007,<sup>2</sup> together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiff's motion seeking sanctions against defendants is denied.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York  
September 26, 2007

**FILED**  
OCT 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
HON. MARTIN SHULMAN, J.S.C.

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<sup>2</sup> Plaintiff requests interest from July 17, 2005, the date of plaintiff's injury. However, CPLR §5003-a (e) only permits interest on the amount set forth in the proposed release "from the date that the release and stipulation discontinuing action were tendered."