

Macaluso v Macaluso
2008 NY Slip Op 30380(U)
February 5, 2008
Supreme Court, Suffolk County
Docket Number: 0017173/2006
Judge: Elizabeth H. Emerson
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-03-07, 10-03-07, 11-27-07

SUBMITTED: 12-5-07,

MOTION NO.: 005-MG Case Disp.

006-MD Case Disp.

008 -MD Case Disp.

_____ x
ANTHONY N. MACALUSO, SR. a fifty percent
shareholder of S&M HEATING CORP., suing in the right
of S&M HEATING CORP.,

Plaintiff

ROBERT J. DEL COL, ESQ.

Attorney for Plaintiff

35 Dewey Street

Huntington, New York 11743

-against-

SANTO F. MACALUSO JR. and
S&M HEATING CORP.,

Defendants

ANTHONY P. GALLO, P.C.

Attorneys for Defendants

6080 Jericho Turnpike

Commack, New York 11725

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Upon the following papers numbered 1 to 55 read on this Order to Show Cause to Enforce the Stipulation of Settlement; Notice of Motion and supporting papers 1-21; Notice of Cross Motion and supporting papers to Vacate the Stipulation of Settlement 22-43; Replying Affidavits and supporting papers 44-45; Notice of Motion and supporting papers to Quash the Subpoenas 46-451; Answering Affidavits and supporting papers 52-55; it is,

ORDERED that the motion dated October 3, 2007 by Plaintiff, Anthony Macaluso ("Anthony" or "Plaintiff") seeking to set aside the Stipulation of Settlement entered into by the parties on July 6, 2007 (the "Settlement") is denied; and it is further

ORDERED that the portion of the motion dated October 3, 2007 by Defendant Santo F. Macaluso, Jr. ("Santo" or "Defendant") seeking to enjoin Anthony from entering upon the business premises or engaging in any activity concerning the business, banking or financial affairs of the subject companies is denied; and it is further

ORDERED that the portion of the motion dated October 3, 2007 Santo seeking enforcement of the Settlement is denied as academic; and it is further

ORDERED that the motion by Santo, dated November 27, 2007 seeking to quash the subpoenas served by Anthony, is denied as academic.

As counsel for both parties correctly state in their respective affidavits and reiterated

at the hearing on this motion held on December 17, 2007, this Court has spent much time assisting counsel in resolving the many issues raised herein. As such the Court is familiar with the procedural history and facts surrounding this action. Accordingly, only those issues which are directly related to the within motions will be discussed herein.

This case arises out of the inability of both shareholders to effectively share the responsibilities of conducting the day-to-day affairs of the subject companies. Each of the shareholders has raised concerns about the others' conduct, integrity, and ability to protect the interest of all shareholders and seek removal of the other. After many conferences and a hearing lasting several days at which these issues were explained, the parties reached an agreement to settle their disputes. They entered into a stipulation of settlement, which was placed on the Court record on or about July 7, 2007 (the "Settlement").

It is alleged in Plaintiff's motion that the Settlement was premised on the presumption as to the relative health of the companies, the ability to perform due diligence and Anthony's ability to secure financing to fund the buy out. Anthony argues that during the discovery phase of the litigation, Santo was not forthcoming with documents and as a result, he was unaware of the poor financial condition of the companies. Anthony claims that he relied on Santo's representations that the companies were in sound financial shape and argues among other things, fraud in the inducement.

Plaintiff also argues that both parties were under the mistaken belief that the real estate owned by the companies was worth over two million dollars and would be sufficient to support bank financing of the Settlement. In addition, Anthony's counsel alleges that he made an error when putting the Settlement terms on the record, in that he set forth the baseline price for the buyout to be \$2,100,000.00 rather than \$2,000,000.00. It is Plaintiff's contention that a letter dated May 11, 2007 discussing a potential resolution, provided the actual framework of the Settlement. This letter sets forth a base line price for a buy out of \$2,000,000.00. Plaintiff first argues that this "scrivener's error" provides sufficient basis to render the contract void. Plaintiff also argues that if the court does not find the contract void based on this error, he is entitled to relief from the Settlement under CPLR 5015 (a) and CPLR 2221 (a). Plaintiff contends that the real estate was appraised at \$1,400,000.00 and would only support bank financing in the amount of \$1,000,000.00. As such, enforcement of the Settlement would be unconscionable. He contends that the court possess a broad discretion to vacate its orders where, as here, it would be done in furtherance of interest of justice.

In opposition to Anthony's arguments to set aside the Settlement and in support of his motion to compel its performance, Santo claims that the Settlement terms were clear, unconditional and unambiguous and should be enforced. Santo claims that Anthony has failed to prove the existence of a mistake and as such, the court should not set aside the Settlement. He further contends that Anthony was fully aware of the "fiscal integrity" of the companies and that Anthony's reliance on the doctrine of mistake, is misplaced.

Turning first to Plaintiff's argument regarding the "scrivener's error" allegedly made when placing the Settlement on the record. A party seeking to establish that a mistake

sufficient to set aside a contract has been made, must do so by clear, positive and convincing evidence (*see, Amend v Hurley* 293 NY 587; *see also Selmar Garage Corp. v Rink Realty Corp.* 102 NYS2d 566 where the evidence must be clear and convincing as to leave no room for doubt). Here, Plaintiff's argument is belied by the transcript of the Settlement which states numerous times that the agreed upon amount was \$2,100,000.00. In addition, both individual parties were present during the proceedings and were allocuted on the record as to their understanding and agreement of the terms of the Settlement. The court finds that Plaintiff has failed to satisfy its burden as to the alleged scrivener's error and denies its application to void the Settlement on that basis.

Turning now to Plaintiff's remaining arguments. Stipulations of settlement are favored by the courts and not lightly cast aside, (*see, Weissman v Bondy & Schloss et al* 230 A.D.2d 465). Stipulations of settlement which put an end to litigation, promote efficient dispute resolution and are essential to the litigation process (*see, Hallock v State of New York* 64 NY2d 224). These stipulations are especially favored where the parties have been represented by counsel (*see, In re Estate of Stark*, 233 AD2d 450). Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation (*see, Weissman v Bondy & Schloss et al* 230 A.D.2d 465). In addition, mistake of fact is not a ground upon which a compromise and settlement may be easily avoided. The burden of proof as to the existence of a mistake, is on the party who asserts it as a ground of avoidance (*see, Matosin v State of New York* 58 Misc2d 632). Furthermore, while mutual mistake is grounds for reformation or rescission of a contract (*see, Golderg v Mfrs. Life Ins. Co.*, 242 AD2d 175, 179) it may not be invoked by a party to avoid the consequences of his own negligence (*see, P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201; *see also, 2001 Commerce Street Corp. v Star Enter.*, 14 AD3d, 504, 505; Even when a party must go beyond its own efforts in order to ascertain relevant facts (such as obtaining experts' reports), courts have held that the party must bear the risk of mistake if he chooses to act on his otherwise limited knowledge (*see, P.K. Dev. v Elvem Dev. Corp.*, *supra* at 202). The failure of events to develop or continue as expected, no matter how well-founded the expectation, does not entitle the disappointed party to reformation or avoidance of the contract (*Id.* at 202; *see also, Wallace v 600 Partners Co.*, 205 AD2d 202, *affd* 86 NY2d 543 [courts should not rewrite an agreement which is clear and explicit simply because a party's expectation of the bargain does not materialize due to a change in economic climate]).

Here, Plaintiff's argument that both parties were under the mistaken belief as to the value of the property, is insufficient to set aside the Settlement. Although the argument was made that the Settlement was reached "after a marathon hallway negotiation" and alleged that it was premised on the relative health of the corporation, the ability to perform due diligence, and the availability of bank financing, none of these conditions were placed on the record or incorporated in any manner into the Settlement. It is well settled that a party will not be relieved of its contractual obligations on the basis of an intervening contingency when it would have been reasonable to provide for such contingency in the contract (*see, P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200). The court notes that the parties previously attempted to reach a settlement both on their own and with the Court's assistance as evidenced by the May 11, 2007 letter. At any time during such negotiations the Plaintiff could have easily secured an appraisal of the real estate.

Courts have held that even where a party must go beyond its own efforts in order to ascertain relevant facts, such as obtaining experts' reports, that party must bear the risk of mistake if it chooses to act on its otherwise limited knowledge (*see, P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200).

Plaintiff's argument that he was unaware of the financial status of the Companies is also insufficient. As noted in both the moving papers and opposition thereto, this court is well aware of the detailed history of this case including allegations of mismanagement and waste of the companies assets asserted by both parties. It is difficult to believe given the history between the litigants, that Anthony relied upon statements made by Santo in deciding to settle this litigation or that he only recently discovered financial difficulties within the company. A contracting party's negligence or conscious ignorance of the true facts does not warrant reformation or rescission of the contract, but requires that the agreement be enforced as written (*see, P.K. Dev. v Elvem Dev. Corp.*, *supra* at 201-202; *Deventer v CS SCF Mgt. Ltd.*, 2007 NY Slip Op 31955[U] [2007]). Therefore the Court finds that the Settlement entered into by the parties on July 7, 2007 is in full force and the parties are directed to comply with the terms contained therein within 90 days from the date herein. In light of this decision, and Anthony Macaluso's obligation to purchase his brother's 50% shares in the companies, the Court denies Defendants' motion to exclude Anthony Macaluso from the business premises or from making any decisions regarding the companies.

HON. ELIZABETH HAZLITT EMERSON

DATED: February 5, 2008

J. S.C.