

Romanelli v DiSilvio

2008 NY Slip Op 32860(U)

September 16, 2008

Supreme Court, Nassau County

Docket Number: 8083/2008

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

SALVATORE ROMANELLI,

**TRIAL/IAS, PART 7
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION DATE: 6/26/08
MOTION SEQ. NO.: 001**

**MARIA DISILVIO AND
ANTONIETTE CICHIELLO**

INDEX NO.: 8083/2008

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

PRELIMINARY STATEMENT

The Defendants move for dismissal of the complaint pursuant to Civil Practice Law and Rules § 3211(a)(1)(5) and (7) on the grounds that the action is time-barred by the applicable six-year statute of limitations, and that a defense is based on documentary evidence. The Plaintiff, acting pro se, opposes the motion, claiming that the July 31, 1997 stipulation among the parties in a prior action was ongoing, that in 2004 counsel for the Defendants requested that he execute General Releases in connection with that stipulation, and the Statute of Limitations was revived, and began to run again by the actions, statements, letters, demands and payments of the Defendants and Defendant's attorneys in accordance with General Obligations Law § 17-101 and the case of *Sullivan v. Troser Mgt., Inc.*, (4th Dept. 2005).

BACKGROUND

The Plaintiff and Defendants are siblings. Between 1984 and 1992, as a partnership known as Tri-Equity Partners, they acquired title to premises known as 82, 88 and 90 Horton

Avenue, Lynbrook, NY. At some point disagreements prompted the Defendants in this action to start a proceeding against the Plaintiff. This matter was ostensibly resolved by a stipulation of settlement, So Ordered by Hon. Thomas A. Adams, J.S.C., on July 31, 1997.¹ Two of the issues covered by the stipulation are the subjects of the instant action.

The first involves a claim for one-third of the net proceeds of tax certiorari proceedings involving 88 and 90 Horton Avenue against Nassau County and the Village of Lynbrook. According to the Plaintiff, the County refunded \$33,820.58 in excess taxes,² and the proceedings against the Village were not pursued, in violation of the stipulation. The second claim is that the Defendants failed to pay him \$15,000 upon his vacating the premises, as was required in the stipulation.

The relevant portion of the July 31, 1997 stipulation is as follows:

MR. SCHLESINGER: On or before September 1, the defendant Salvatore Romanelli will convey to the plaintiffs all of his right, title and interest in the New York properties, and all improvements thereon, and will execute all documents reasonably necessary to effectuate this transfer. Any tax certiorari proceeds on the account of the New York properties as, of and when they're realized, net of any costs in obtaining those tax certiorari proceeds, shall be split two-thirds/one-third: two-thirds to the plaintiffs, one-third to the defendants.

The defendants shall reside in the property, have the right to reside in the property, until June 30, 1998.

The plaintiffs will pay to the defendants ten thousand dollars upon the delivery of the deeds to the New York properties and fifteen thousand dollars upon their vacating the New York

¹ Transcript annexed as Exh. "C" to Motion.

² Exh. "E" to Affirmation in Opposition.

properties.

While copies of the deeds are not annexed to either the moving or opposition papers, they were presumably executed, since there is no claim for the \$10,000 payable upon delivery. It appears that Mr. Romanelli did not vacate on June 30, 1998, but did so on April 26, 2000, and only after service of a Warrant of Eviction.³

DISCUSSION

The Plaintiff's claim for payment of \$15,000 upon his vacating the premises is time-barred. He did not vacate the premises on June 30, 1998 as he was required to do by the stipulation, but left only after the issuance of a Warrant of Eviction. According to the Judgment dated February 9, 2000, he consented to the entry of judgment against him in the amount of \$1,838.80 and the issuance of the Warrant of Eviction.⁴ Aside from the fact that there was no mention of the \$15,000, to which he was probably not entitled, the last day for him to interpose a claim for that amount was six years from April 26, 2000. Civil Practice Law and Rules § 213(2).

The Plaintiff interprets the stipulation of July 31, 1997 as requiring the Defendants in this action to prosecute future tax certiorari proceedings against the Village of Lynbrook and Nassau County, apparently in perpetuity, and give him one-third of the net proceeds. But the same paragraph of the stipulation required him to transfer all of his right title and interest in the properties to his sisters by September 1, 1997.⁵ The language of the stipulation is clear on its face. The Plaintiff was entitled to one-third of the net proceeds from tax certiorari proceedings for the tax periods during which he was an owner of the realty, not after he relinquished all right, title and interest in the properties.

³ Affirmation of Frank C. Dell'Amore, Esq. and Affidavit of Maria Disilvio , annexed to Motion, together with Exh. "C".

⁴ Exh. "C" to Motion.

⁵ *Id.* at p. 5.

By letter dated May 25, 2005 ⁶ the Plaintiff expressed his disagreement with the calculation of his share of the fee, and advised the attorneys handling the matter that the termination of the certiorari proceedings against the Village of Lynbrook on January 21, 1998 was a breach of the stipulation agreement. If it was a breach, the time within which to bring an action expired in January 2004. Such claim is therefore time-barred.

The Plaintiff has produced no documentary evidence to establish that the Statute of Limitations began to run anew at some point within six years of May 1, 2008, the date upon which the action was commenced. Rejuvenation of a period of limitations requires a writing in which the party to be charged acknowledges the existence of an obligation and contains nothing which is inconsistent with an intention to honor the obligation. *Sullivan v. Troser Mgt., Inc.*, 15 A.D.3d 1011 (4th Dept. 2005). The issue is governed by General Obligations Law § 17-101, which provides as follows:

§ 17-101. Acknowledgment or new promise must be in writing.

An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property. This section does not alter the effect of a payment of principal or interest.

None of the documents from counsel for the Defendants, upon which the Plaintiff relies to reinvigorate the Statute of Limitations, contains any acknowledgment that the Plaintiff is entitled to \$15,000 in return for his vacating the premises, or that he is entitled to a share of tax refunds beyond the time when he had an ownership interest in the property and contributed to the payment of taxes.

By letter dated September 22, 2004, counsel for the Defendants forwarded General

⁶ Exh. "D" to Motion.

Releases to his client, for execution by the Plaintiff. This would appear to be in conjunction with the resolution of the tax certiorari proceedings, which produced a \$289.41 check dated December 21, 2004, and payable to the Plaintiff.⁷ The January 5, 2005 covering letter certainly did not acknowledge any obligation beyond the amount forwarded. In response to the Plaintiff's letter of May 25, 2005, counsel further explained the calculation of the amount paid, and advised the Plaintiff that the Defendants had no further obligation to him beyond his relinquishment of his interest in the real property. Upon receipt of correspondence from counsel on behalf of the Plaintiff,⁸ counsel for the Defendants reiterated the position that the Plaintiff was not entitled to a share of tax refunds for the period beyond which he surrendered his interest in the properties.⁹ A further letter to the same attorney, in response to a telephone call, was to the same effect.¹⁰

The Plaintiff's Fourth Cause of Action alleges that the Defendants fraudulently induced him to agree to the 1997 stipulation upon the representation that they would prosecute tax certiorari proceedings, in which he was to share, and that they never intended to do so. Aside from the fact that they did prosecute such actions, except against the Village, the Plaintiff has not met the stringent requirements for an allegation of fraud.. Civil Practice Law and Rules § 3016(b) provides that "(w)here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail".

Even if the language were adequately detailed to satisfy the statute, the action was not commenced within six years of the alleged fraud. Civil Practice Law and Rules § 213(8). The two-year from discovery rule of Civil Practice Law and Rules § 203(g) is unavailing since the

⁷ Exh. "H" to Opposition.

⁸ Exh. "K" to Opposition.

⁹ Exh. "L" to Opposition.

¹⁰ Exh. "M" to Opposition.

Plaintiff's correspondence of May 25, 2005 ¹¹ stated that "... the Tax Certiorari proceedings against the Village of Lynbrook for 88 & 90 Horton Avenue, Lynbrook, NY were terminated by your clients on, January 21, 1998". The action would have to have been commenced within two years of May 25, 2005, but was not filed until May 1, 2008.

CONCLUSIONS

The Plaintiff's First Cause of Action, to the extent it alleges a failure of the Defendants to prosecute tax certiorari proceedings, is dismissed as time-barred.

The Second Cause of Action, requesting a Declaration that the Defendants have violated the Stipulation of July 31, 1997 is also **dismissed** as barred by the Statute of Limitations.

The Third Cause of Action for \$15,000 alleged to be due in return for the Plaintiff's vacating the premises is **dismissed** because the action would have to have been commenced within six years of April 26, 2000, the date he finally vacated.

The Fourth Cause of Action is barred by the Statute of Frauds, in that it was not commenced within six years of the alleged misrepresentation or within two years of discovery. It is therefore **dismissed**.

This constitutes the Order of the Court.

Dated: *Sept 16, 2008* ENTER:

ENTERED *Donna Munslow*
J.S.C.
OCT 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

¹¹ Exh. "D" to Motion.

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