

Matsos Contr. Corp. v Katahas Painting Corp.

2009 NY Slip Op 32143(U)

September 11, 2009

Supreme Court, Queens County

Docket Number: 3880/2009

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA Part 14

MATSOS CONTRACTING CORP. x

Index
Number 3880 2009

- against -

Motion
Date June 16, 2009

KATAHAS PAINTING CORP.

x

Motion
Cal. Number 12

Motion Seq. No. 3

The following papers numbered 1 to 10 read on this motion by plaintiff Matsos Contracting Corp. for an order enforcing the terms of the settlement agreement and appointing a receiver to effectuate the terms of the transfer of the moneys pursuant to the settlement agreement.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibit (A).....	1-4
Opposing Affirmation.....	5
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Plaintiff's Memorandum of Law.....	
Defendant's Memorandum of Law - Affidavit - Exhibits (A-C).....	
Plaintiff's Reply Memorandum of Law.....	
Defendant's Reply Memorandum of Law.....	

Upon the foregoing papers this motion is determined as follows:

This court, in its order of June 26, 2009, directed that the plaintiff and defendant submit memoranda of law which addressed both the issue of the enforceability of the written stipulation agreement between the parties, as well as the requirements for the appointment of a receiver. The parties have now submitted memoranda of law and reply memoranda of law, together with affidavits of service, within the time constraints set forth in said order.

The within action for breach of contract and conversion was commenced on February 18, 2009. The court, in a revised order to show cause dated February 20, 2009, froze the certificate of deposit account at First Central Savings Bank in the name of Theodore Tritaris in account number 0101014355, and the Charles Schwab account number 85070602. The court further enjoined the defendant from moving, accessing or affecting the funds held in these accounts in any way.

On April 21, 2009, the parties engaged in settlement negotiations at plaintiff's counsel's office. Present at said negotiations were Theodore Tritaris, on behalf of defendant Katahas Painting, Corp., defendant's counsel, Constantine Giannakos, Steve Shinas, Maria Shinas, George Shinas and Bill Shinas on behalf of plaintiff Matsos Contracting Corp., and Matthew J. Conroy, plaintiff's counsel.

As a result of these negotiations, plaintiff's and defendant's respective counsel executed a settlement agreement dated April 21, 2009, a stipulation of discontinuance dated April 21, 2009, and a so-ordered stipulation to vacate the order of February 20, 2009 which froze the above-mentioned accounts. The stipulation of settlement provides as follows:

“1. The parties agree that, upon the completion of the terms of the settlement contained in paragraphs 2-6 below, the subject action shall be dismissed with prejudice without costs and all rights of appeal and review shall be waived. The parties further agree that a Stipulation of Discontinuance with Prejudice in the form annexed hereto as Exhibit “A” shall be filed with the Queens County Clerk's Office by counsel for the Plaintiffs.

2. The parties agree to file a ‘So Ordered’ Stipulation, in the form annexed hereto as Exhibit “B”, with the Court releasing the Charles Schwab account (85070602) and First Central Savings Bank CD (0101014355) currently restrained by Order of this Court.

3. The Defendant agrees to transfer all of the moneys transferred to the Charles Schwab account of Theodore Tritaris from the Katahas Painting Corp. account back to an account identified by Matsos Contracting Corp., less the

sum of \$300,000.00 which the Defendant shall be entitled to retain in consideration of the mutual promises and provisions of this agreement.

4. The Defendant agrees to transfer all of the moneys held in the First Central Savings Bank CD to an account identified by Matsos Contracting Corp.

5. Theodore Tritaris, a signatory to this Agreement agrees to execute any and all documents necessary to effectuate the transfers contained in paragraphs 3 and 4.

6. The parties agree to execute all documents necessary to transfer ownership of Katahas Painting Corp. and DZ Construction Corp. from Theodore Tritaris to Steve Shinas.

7. The parties acknowledge and agree that they have entered into this agreement voluntarily, that they have had the benefit of independent counsel of their choice and that they fully understand all the terms and conditions of the agreement.”

In view of the fact that the stipulation of discontinuance was not filed with the clerk of the court, as required by CPLR 3217(a)(2), the within action has not been terminated, and the court may determine the within motion (*see e.g. Velez v Hurley*, 264 AD2d 513, 515 [1999]); *see also Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 57 [1979]).

Plaintiff’s counsel stated in his affidavit in support of the motion to enforce the stipulation of settlement that on April 22, 2009, the day after the stipulation of settlement and other documents were executed, he received a telephone call from defendant’s counsel who informed him the defendant wanted to “back out of the agreement”. Plaintiff served the within motion to enforce the stipulation of settlement on April 24, 2009, and filed it with the court on April 28, 2009.

Defendant has not cross-moved to vacate the stipulation of settlement. Defendant’s counsel, in opposition to the within motion, states in his affidavit that, after the subject agreements were executed, his client contacted him that evening and informed him that he did not want to participate in the settlement agreement because he felt that he was coerced, pressured and under duress to enter into the agreement. Counsel states that he contacted plaintiff’s counsel the next morning and that he sent a counterproposal for the settlement. Mr. Tritaris, however, did not submit an affidavit in support of the claim of coercion and duress.

This court, in its order of June 26, 2009, did not invite the parties to submit additional affidavits or documentary evidence in support of their respective positions. Nor did defendant seek leave to serve an additional affidavit or documentary evidence. Therefore, Mr. Tritaris' affidavit and the additional documentary evidence will not be considered as they exceed the scope of the June 26, 2009 order and are untimely (*see* CPLR 2214).

Defendant, in its memorandum of law and reply memorandum of law, has abandoned the defense of coercion and duress and now asserts new defenses based on fraud, overreaching or plaintiff's unilateral mistake. Since the parties' motion papers were fully submitted to the court on June 16, 2009, defendant may not raise in its memorandum of law new defenses to the within motion. The court, therefore, will not consider those portions of the defendant's memorandum of law and reply memorandum of law which are addressed to the enforceability of the stipulation of settlement as they are based entirely on these new defenses.

It is further noted that, as defendant has not submitted or filed a copy of its answer, the court is unable to determine whether the affirmative defense of fraud was properly raised in the answer and whether the defenses of fraud and mistake were properly pleaded (*see* CPLR 3018, 3016).

To be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104 (*see Starr v Rogers*, 44 AD3d 646 [2007]; *DeVita v Macy's E., Inc.*, 36 AD3d 751 [2007]; *Marpe v Dolmetsch*, 256 AD2d 914 [1998]). Pursuant to CPLR 2104, a stipulation of settlement is not enforceable unless it is made in open court and entered, or contained in a writing subscribed by the parties or their attorneys (*see Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 285 [2004]; *Starr v Rogers, supra*).

Here, the written settlement agreement is subscribed by the parties' respective counsel and by "E Shinas" on behalf of Matsos Contracting Corp., by Theodore Tritaris on behalf of Katahas Painting Corp., and individually by Theodore Tritaris and Steve Shinas. This writing satisfies the requirements of CPLR 2104. Since the stipulation was signed by the attorney for the plaintiff corporation and, thus, was sufficient to bind the corporation, defendant counsel's assertions regarding Steve Shinas' authority to bind the plaintiff are rejected (CPLR 2104; *Eastman v Steinhoff*, 48 AD3d 738 [2008]; *see also JP Morgan Chase Bank, N.A. v Cellpoint Inc.*, 54 AD3d 366 [2008]).

Stipulations of settlement are judicially favored and should not be lightly cast aside (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Matter of Kanter*, 209 AD2d 365 [1994]). Thus, a party will not be relieved from the consequences of a stipulation unless there was sufficient cause to invalidate it, such as fraud, mistake, collusion,

accident, or some other ground (*see Hallock*, 64 NY2d at 230; *Daniel v Long Is. Univ.*, 184 AD2d 350, 352 [1992]).

A stipulation of settlement is essentially a contract between the parties which must be enforced according to its terms, without reference to extrinsic evidence unless the terms are ambiguous (*see CV Holdings, LLC v Artisan Advisors, LLC*, 9 AD3d 654, 656, 780 NYS2d 425 [2004]; *Dudick v Gulyas*, 4 AD3d 604, 606, 770 NYS2d 924 [2004]; *Serna v Pergament Distribs.*, 182 AD2d 985, 986, 582 NYS2d 550 [1992], *lv dismissed* 80 NY2d 893, 600 NE2d 636, 587 NYS2d 909 [1992]). Stipulations are especially favored where the parties have been represented by counsel (*In re Estate of Stark*, 233 AD2d 450 [1996]; *Heimuller v Amoco Oil Corp.*, 92 AD2d 882 [1983]). Stipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process (*Hallock v State of New York, supra*; *Gage v Jay Bee Photographers, Inc.*, 222 AD2d 648 [1995]; *Matter of Kanter, supra*).

Here, the stipulation is clear on its face, and no basis exists for relieving the defendant from the subject stipulation of settlement. It is noted that Mr. Tritaris has failed to submit an affidavit in support of the claim of coercion and duress and his counsel's affirmation in this regard is insufficient to support such a claim. The fact that the negotiations leading to the settlement may have been contentious is insufficient to establish the defense of coercion or duress. As noted above, defendant's claims of fraud, overreaching and unilateral mistake were improperly raised in its memoranda of law and will not be considered here. Defendant's opposition to the stipulation appears to have resulted from a change of mind which is an insufficient basis on which to vacate the stipulation (*Thompson Medical Co., Inc. v Benjamin Pharmaceuticals, Inc.*, 4 AD2d 504 [1957]; *In re Accounting by Tray*, 5 Misc 3d 1017A [2004]).

The appointment of a temporary receiver is an extreme remedy that should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests (*see Secured Capital Corp. of NY v Dansker*, 263 AD2d 503, 504 [1999]; *DaSilva v DaSilva*, 225 AD2d 513 [1996]; *Modern Collection Assoc. v Capital Group*, 140 AD2d 594 [1988]). The Second Department has sparingly sanctioned the use of a receiver and only under compelling circumstances.

In support of the within request for the appointment of a temporary receiver, plaintiff asserts that defendant's principal Tritaris removed the moneys in question from the corporate account and placed them in personal accounts with Charles Schwab and First Central Savings Bank and that Tritaris seeks to disregard the parties' settlement agreement. The removal of said funds is the basis for this action and has been resolved by the parties' settlement

agreement. To the extent that the defendant corporation has contested the validity of the settlement agreement, this falls short of a clear evidentiary showing of a need to protect said assets.

It is noted that funds held in the Charles Schwab account and the funds held in the First Central Savings Bank CD have been frozen pursuant to a court order. Said order will remain in effect until such time as Mr. Tritaris executes the papers necessary to turn over the sums held in said accounts to plaintiff's designee, the so-ordered stipulation is executed, and the stipulation of settlement is filed with the clerk of the court. The appointment of a temporary receiver, therefore, is not warranted.

In view of the foregoing, that branch of plaintiff's motion which seeks enforcement of the April 21, 2009 stipulation of settlement is granted and that branch of plaintiff's motion which seeks the appointment of a temporary receiver is denied.

Accordingly, the parties are directed to comply with the requirements of the settlement agreement dated April 21, 2009 and to execute all documents set forth therein. Upon such compliance, a copy of this order with notice of entry and proof of such compliance with the settlement agreement shall be submitted to this court with a copy of the stipulation to be so-ordered.

Dated: September 11, 2009

J.S.C.