

Connery v Sultan

2010 NY Slip Op 30364(U)

February 9, 2010

Supreme Court, New York County

Docket Number: 401336/05

Judge: Marcy S. Friedman

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

PRESENT MARCY S. FRIEDMAN
Justice

PART 57

Stephanie Cosman Connery

INDEX NO. 401336/05

- v -

MOTION DATE _____

Burton S. Sultan

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to Enforce Stip

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

2

3

Cross-Motion: Yes No

Ltr. 1-2

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

FEB 18 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/10/10

Marcy S. Friedman
MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

STEPHANE COSMAN CONNERY and
MICHELINE CONNERY,

Index No.: 401336/05

Plaintiffs,

DECISION/ORDER

- against -

BURTON S. SULTAN,

Defendant.

This action involves a long-standing dispute over repairs to a two-unit condominium townhouse. Plaintiff Stephane Connery owns the upper unit which is occupied by his parents, Sean and Micheline Connery. Defendant Burton Sultan, M.D. owns the lower unit which is occupied by various members of his family. The tortured history of the proceedings, including the many duplicative and often burdensome, if not frivolous, lawsuits brought by the parties against each other was detailed in this court's decision in a related case (Sultan v Connery, Sup Ct, New York County, Dec. 7, 2007, Index No. 101986/07), and will not be repeated here.

In the instant action, by order dated April 19, 2006, this court appointed a receiver to effectuate repairs ordered in an arbitration award that had previously been confirmed by the court. The action was settled by stipulation of the parties on the record on April 9, 2008. Dr. Sultan now moves to enforce the stipulation and to compel the Connerys to discontinue an action against them in Nassau County.

The stipulation of settlement provided for the receiver, with the assistance of a consultant,

to perform all work set forth in Phase I of a report/bid from a specified contractor (hereafter Court Exhibit I). (Apr. 9, 2008 Tr. at 29.) The stipulation further provided that releases and stipulations of discontinuance are to be “held in escrow . . . , delivery conditioned upon the roof replacement and related work set forth on Court Exhibit I being performed without obstruction or interference by the Sultans.” (Id. at 32.) Prior to the stipulation of settlement, a pending malicious prosecution action brought by Stephan Connery against Dr. Sultan (Connery v Sultan, Supreme Court, Nassau County, Index No. 651/05) had eventuated in a jury verdict on liability against Dr. Sultan. The stipulation adjourned the Nassau County action for four months pending completion of the roof work. (Id.)

After the parties’ entry into the stipulation of settlement, the parties appeared in court at the request of the receiver on May 20 and July 29, 2008, based on access problems posed by Dr. Sultan and his wife, Marilyn Sultan (“the Sultans”). The Sultans, who had from the outset of the parties’ dispute objected to the scope of work proposed for the townhouse by the Connerys, were refusing to give access to their backyard for installation of scaffolding on the North facade of the building. The Sultans took the position that the work on the North facade, although agreed to in the stipulation of settlement, was unnecessary because it had in fact been performed prior to the stipulation. The receiver represented that the installation of the North facade scaffolding was necessary to perform the roof work.

The court admonished the Sultans that the stipulation of settlement was in effect and would be enforced unless relief from the stipulation were granted, and that such relief could be sought only by written motion brought on legally sufficient grounds. (July 29, 2008 Tr. at 39-43.) The court accordingly issued orders directing the Sultans to permit access for the

installation of the scaffolding. (See May 20, 2008 Tr. at 8-9; July 29, 2008 Tr. at 23). At the next conference on August 6, 2008, the Sultans appeared with their adult daughter, Dr. Marla Sultan, who also resides, at least on occasion, at the building. Reiterating that the stipulation of settlement was in effect and could be vacated only on motion brought for legally sufficient grounds, the court explained the risk that the Sultans could be held in contempt for obstructing work under the stipulation. (Aug. 6, 2008 Tr. at 26-30.)

Just as a settlement was achieved when Stephane Connery appeared in court on April 9, 2008, so was the Sultans' cooperation with access achieved after the appearance by their daughter on August 6, 2008. Thus, at a conference on October 2, 2008, the receiver advised the court that Dr. Sultan had been "extremely cooperative" with respect to various inspections. (Oct. 2, 2008 Tr. at 9-10.) The receiver also advised the court that the several roofs at the building were being prepared for removal, that the main roof would be delayed pending work on the elevator in order to avoid damage to the main roof, and that absent an unexpected occurrence, the roof work could be done by mid-November. (*Id.* at 22-23.) At the next court date on May 20, 2009, the receiver apprised the court that the rooftop work was substantially completed although there were some drainage problems from the roof that had to be fixed, and that the new elevator was installed and required only interior decorations. (May 20, 2009 Tr. at 13, 10.) In response to the court's questioning, the receiver stated that he had had "reasonable" cooperation from the Sultans in doing the roof work. (*Id.* at 13.)

In seeking enforcement of the April 9, 2008 stipulation of settlement, Dr. Sultan argues that the roof work has been performed and that the Connerys have repudiated the settlement by seeking to proceed with the Nassau County malicious prosecution action. The Connerys argue

that the Sultans obstructed the roof work in the four months after the settlement was entered into, and they therefore are not obligated to discontinue the action.

The Sultans' interference with the installation of the scaffolding necessary for the roof work between April and July 2008 is not to be condoned. It is, however, undisputed on this record that the roof work proceeded without significant incident on the Sultans' part after the July 29, 2008 conference, and that it took substantially more than four months to complete the roof work after the scaffolding was installed. Significantly, as noted above, the receiver who was fully familiar with the progress of work at the building, confirmed that he had reasonable cooperation from the Sultans with the roof work.

Resolution of Dr. Sultan's motion for enforcement of the stipulation of settlement does not, however, turn on his claim that the work has been completed or that he has substantially performed under the stipulation. It is well settled that substantial compliance with a contract is insufficient to excuse a failure to perform an express condition, which must be "literally performed." (Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 690 [1995].) Here, the discontinuance of the pending actions, including the Nassau County action, was conditioned upon an express condition – namely, performance of the roof and related work without obstruction. Although the Sultans have now offered signed stipulations of discontinuance of the various actions, they initially failed to put the stipulations in escrow pending the roof work. As the Sultans also initially failed to perform in strict compliance with the condition that the roof work be performed without obstruction, the court finds that they defaulted under the contract.

A default in performing an express condition or, put another way, the "nonoccurrence of

the condition,” may nonetheless “be excused by waiver, breach or forfeiture.” (*Id.* at 691.) The record in this case establishes as a matter of law that the Connerys repeatedly sought enforcement of the stipulation of settlement after the Sultans’ interference with the installation of the scaffolding and consequent breach of the condition, and that this conduct bars them from objecting to enforcement of the stipulation.

By letter dated July 28, 2008, the Connerys’ counsel notified the Sultans’ then counsel that “[b]y reason of your clients repeated interference with the Receiver’s duties, and the construction which he is attempting to do,” “we intend to proceed with the malicious prosecution action based upon your clients’ breach of the settlement agreement.” This letter apparently led to a number of motions before the Nassau County court to vacate the liability verdict in the malicious prosecution action.

Astoundingly, the Connerys never apprised this court that they had taken the position that the stipulation was unenforceable as a result of the Sultans’ breach. Instead, the parties appeared here on repeated occasions in connection with the enforcement of the stipulation of settlement. On each occasion, July 29, 2008, August 6, 2008, and October 2, 2008, the Connerys took the position that the stipulation should be enforced.¹ At none of the appearances through October 2008 did the Connerys assert their claim that the stipulation was unenforceable due to the

¹At the July 29, 2008 conference, Robert Lynn, the Connerys’ attorney, advised the court that he had not received the releases that were to be held in escrow from the Sultans. When the court stated that any request for relief from the stipulation must be made by written motion, Mr. Lynn responded that “I do not intend to ask for any relief today.” (Tr. at 11.) After the court noted that the purpose of the appearance was “to try to make sure the repairs go ahead immediately,” (*id.* at 12), Mr. Lynn stated: “My direction from my client is to do what we can to get this roof installed.” (*Id.* at 13.) At the October 2, 2008 appearance, the court heard the receiver’s motion for authorization to enter into a proposal for modernization of the elevator, which was work that the parties agreed to in the April 9, 2008 stipulation of settlement.

Sultans' initial interference with the installation of the North facade scaffolding. The court was not made aware of the Connerys' claim that Dr. Sultan had repudiated the stipulation of settlement until the May 20, 2009 court appearance at which the court heard Dr. Sultan's application for a temporary restraining order to stay the Nassau County action pending hearing of his motion for enforcement of the stipulation of settlement.

In short, the Connerys received the benefit of this court's enforcement of the settlement, without notifying the court, until after the work was substantially complete, that their position was that the Sultans were not entitled to enforcement of the stipulation because of their initial obstruction of the scaffolding necessary for the roof work. This conduct effected a waiver of the Connerys' right to object to enforcement of the stipulation of settlement. (See generally El-AD 250 W. LLC v 30 Hubert St. LLC, 67 AD3d 520 [1st Dept 2009]; Δwards.Com, LLC v Kinko's, Inc., 42 AD3d 178 [1st Dept 2007], appeal dismissed 12 NY3d 847.)

To date, the Sultans have brought three lawsuits against the Connerys and the Connerys have commenced six lawsuits against the Sultans. This current dispute is but the latest in the parties' litigation-fueled version of the War of the Roses. As noted in this court's prior decision, this litigation has been conducted by both parties in a manner that is interfering with, not advancing, their ability to cooperate in the management of the townhouse that is their joint home. (Sultan v Connery, Sup Ct, New York County, Dec. 7, 2007, Index No. 101986/07, supra at 13.) As the receivership is winding down, it is more important than ever that the parties recognize the need to end their unproductive litigation.

It is hereby ORDERED that the motion of defendant, Dr. Burton Sultan, to enforce the April 9, 2008 stipulation of settlement of this action is granted to the following extent: The

parties identified in the April 9, 2008 stipulation shall discontinue with prejudice all of the pending actions between them, including but not limited to Connery v Sultan (Supreme Court, Nassau County, Index No. 651/05), and excluding only the above-captioned action, on condition that defendant delivers all of the required releases and stipulations of discontinuance to plaintiff's counsel so that they are received by plaintiff's counsel within 20 days of the date of entry of this order; and it is further

ORDERED that the branch of defendant's motion for sanctions is denied; and it is further

ORDERED that the Temporary Receiver shall move, within 20 days of the date of entry of this order, on notice to all parties and to the surety on his undertaking, for a final settlement of his account. The motion shall be brought on by order to show cause.

This constitutes the decision and order of the court.

Dated: New York, New York
February 9, 2010


MARCY FRIEDMAN, J.S.C.

FILED
FEB 18 2010
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