

Stroem v Plackis

2010 NY Slip Op 30542(U)

March 3, 2010

Supreme Court, Suffolk County

Docket Number: 17596/2004

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

M E M O R A N D U M

SUPREME COURT, SUFFOLK COUNTY

JAN ARTHUR STROEM,

Plaintiff,

-against-

NICHOLAS PLACKIS, STEPHEN J. WEISS,
KATHLEEN J. WEISS and JUDGE, WEISS
& ASSOCIATES, INC.,

Defendants.

TRIAL TERM PART 37

**BY: HON. JOSEPH FARNETI
A. J. S. C.**

DATED: March 3, 2010

INDEX NO. 17596/2004

WICKHAM, BRESSLER, GORDON
& GEASA, P.C.
BY: ERIC J. BRESSLER, ESQ.
Attorneys for Plaintiff
13015 Main Road - P.O. Box 1424
Mattituck, New York 11952
631-249-9480

GLYNN MERCEP AND PURCELL, LLP
BY: TIMOTHY B. GLYNN, ESQ.
Attorneys for Defendants
North Country Road
P.O. Box 712
Stony Brook, New York 11790
631-751-5757

This matter was submitted for this Court's consideration without a jury. The trial was conducted by the Court on August 10, 14, and 17, 2009. Plaintiff has alleged two causes of action in his verified complaint, to wit: a cause of action seeking to have a certain stipulation and boundary agreement vacated and a prior action reinstated, and a cause of action seeking punitive damages in the amount of \$5 million plus reasonable attorneys' fees. Defendants interposed a verified answer denying the allegations in the verified complaint and asserting four affirmative defenses, to wit: consent; estoppel; adverse possession and partial performance; and unclean hands, and a counterclaim seeking treble damages in the amount of \$1.5 million with respect to the costs of defendants' renovations of a marina abutting their property, and the loss of use of the marina, including the revenues derived therefrom. That portion of defendants' counterclaim seeking damages for loss of use of the marina was withdrawn by stipulation of the parties at the time of trial.

The Court in rendering this memorandum decision has relied upon the testimony and exhibits received in evidence at trial as amplified by the parties' post-trial memoranda received by the Court on November 25, 2009.

I. PROCEDURAL HISTORY:

Plaintiff, JAN ARTHUR STROEM (“plaintiff”), commenced this action by summons and verified complaint on or about July 16, 2004, as a result of a boundary line dispute between the parties. Plaintiff seeks to set aside a stipulation and boundary agreement (“stipulation”) executed by plaintiff on March 22, 2002, and by defendant NICHOLAS PLACKIS (“Plackis”) and defendants STEPHEN J. WEISS and KATHLEEN J. WEISS on April 2, 2002, alleging the material alteration thereof, and monetary damages arising out of such material alteration. Defendants STEPHEN J. WEISS, KATHLEEN J. WEISS and JUDGE, WEISS & ASSOCIATES, INC. (collectively “Weiss”) interposed a verified answer dated May 3, 2005, denying the allegations in the verified complaint and asserting four affirmative defenses, to wit: (1) the material alteration was made with the consent of plaintiff; (2) plaintiff is estopped from prosecuting the instant action based upon the granting of a license to use certain pilings in the stipulation; (3) Weiss acquired the land under a wood shed by adverse possession, and Weiss partially performed under the stipulation by moving the shed; and (4) unclean hands, in that Weiss alleges that plaintiff cut down an electrical pole that supplied power to Weiss’ property, and brought this action “in bad faith with the intention of manipulating the law to obtain advantage over his neighbors.” Weiss also interposed a counterclaim alleging actual damages in the amount of \$500,000 and seeking treble damages in the amount of \$1.5 million, as a result of plaintiff’s alleged refusal to allow Weiss to utilize pilings existing in plaintiff’s foreshore area as well as Weiss’ installation of new pilings. Weiss sought damages flowing from the alleged loss of use of Weiss’ marina, including the loss of revenues derived therefrom. That portion of Weiss’ counterclaim seeking damages for loss of use of the marina was withdrawn by stipulation of the parties at the time of trial (Tr. 213-214).¹ Plackis defaulted in appearing herein.

Weiss had moved for partial summary judgment on their third affirmative defense. By Order dated August 23, 2007 (Doyle, R. J.), the Court denied the motion, holding that Weiss failed to provide sufficient evidence to demonstrate their *prima facie* entitlement to judgment as a matter of law on their third affirmative defense. The Court further held that “[i]n any event, the stipulation precludes them from asserting a claim by prescription.” No appeal was taken from that Order, and as such, has now become law of the case.

¹“Tr. _____” refers to page numbers of the transcript of the trial of this action.

II. FINDINGS OF FACT:

Plaintiff is the fee owner of a parcel of real property commonly known as 125 Sterling Street, Greenport, New York, which abuts for 60 feet a body of navigable water known as Sterling Basin. Plaintiff acquired this property in or about January of 2000. Defendants Weiss own the adjacent parcel of real property commonly known as 117 Sterling Street, Greenport, New York, which also abuts Sterling Basin. Weiss acquired their property from Plackis on or about April 2, 2002.

Plaintiff testified that when he initially acquired the property, he sought to renovate the existing dockage area, which was in disrepair (Tr. 47). Plaintiff further testified that during the planning stage of his renovations, he caused a survey to be completed and became aware that there were possible encroachments across the property line between plaintiff's property and Plackis' property, which property line extends into Sterling Basin (Tr. 48). Plaintiff testified that he initiated communications with Plackis in an attempt to resolve the encroachments, but no agreement was reached (Tr. 48). Plaintiff then commenced a prior action against Plackis in Supreme Court, Suffolk County on or about January 11, 2002, under Index No. 1778/2002, seeking the removal of certain dock structures and a shed that allegedly encroached onto plaintiff's property ("prior action"). Plaintiff also filed a notice of pendency against Plackis' property at that time (Deft. Exh. D). In addition, plaintiff testified that during this time period, he advised Weiss, with whom he was "very friendly," that Plackis' property was available for purchase (Tr. 49), and it became evident that Weiss wanted to purchase the property (Tr. 50).

After commencement of the prior action, plaintiff testified that he consulted an attorney, John Rosenberg, Esq., who ultimately drafted the aforementioned stipulation to make the boundary line "very plain and evident" (Tr. 51). On March 22, 2002, plaintiff executed the stipulation at Mr. Rosenberg's office (Tr. 57), which the Court notes was a six-page, typed document without any handwritten amendments, corrections or additions (Pl. Exh. 2). The stipulation was delivered to the closing of the transfer of the Plackis property to Weiss, which was conducted on April 2, 2002, together with a stipulation of discontinuance of the prior action and a cancellation of the notice of pendency. Plaintiff did not attend the closing (Tr. 62). Plaintiff testified that during the closing, an attorney from Mr. Rosenberg's office called plaintiff to discuss certain amendments to the

stipulation proposed by Weiss (Tr. 63-64). Plaintiff testified that if there was an issue concerning the time line for removal of the shed, then he said "that's not a problem" (Tr. 64). However, plaintiff testified that he never heard anything further about the shed, and never discussed any of the eventual modifications to the stipulation (Tr. 63-64).

Plaintiff testified that in the Spring of 2003, Mr. Weiss announced to plaintiff that he was working on his docks and bulkhead, and would be removing certain pilings which were also utilized to support plaintiff's docks (Tr. 59-60). Plaintiff testified that he told Mr. Weiss that the pilings were on plaintiff's property and that they were not to be removed (Tr. 59). As a result, Weiss erected his own pilings close to the extension of the property line (Tr. 60; Pl. Exh. 1).

Thereafter, plaintiff sought to review the stipulation to determine what he had agreed to therein (Tr. 61). When plaintiff realized that he did not have the stipulation in his files, he obtained a copy from Mr. Rosenberg (Tr. 61-62; Pl. Exh. 3). The copy plaintiff received from Mr. Rosenberg contained handwritten modifications on pages two and three and initials of the parties in connection therewith, including the initials of plaintiff (Tr. 62; Pl. Exh. 3; hereinafter "modified stipulation"). Plaintiff testified that none of the handwritten modifications were discussed with him or authorized by him, notwithstanding the presence of his initials, "JAS," next to each modification (Tr. 63-64). Plaintiff testified that he contacted Mr. Weiss over the course of six months with respect to the modified stipulation to try to resolve the matter in an amicable fashion (Tr. 66). Plaintiff then consulted William Price, Esq., the attorney who had previously referred him to Mr. Rosenberg, who offered to draft another boundary agreement (Tr. 80). On or about September 12, 2003, Mr. Price drafted a boundary agreement (Pl. Exh. 8), but Mr. Weiss refused to sign it (Tr. 81). Plaintiff then commenced the instant action on or about July 16, 2004.

Plackis was called to testify at trial by Weiss. Plackis testified that he installed the docks at his property sometime in the late 1960s (Tr. 134-135), and that he maintained the pilings while he was the owner of the property, including the removal and replacement of certain pilings (Tr. 137).

In addition, Mr. Weiss testified that he attended the closing, along with Mrs. Weiss and Plackis, among others (Tr. 175). Mr. Weiss testified that at the closing, he received the stipulation that was executed by plaintiff, but that it

was not what he had agreed to some weeks earlier (Tr. 176). Mr. Weiss further testified that there were several changes made to the stipulation at the closing, and that there were initials placed on the modified stipulation relative to the changes (Tr. 181; 183-185; Pl. Exh. 3). Moreover, Mr. Weiss testified he understood that as a result of the stipulation, the prior action would be discontinued and the notice of pendency would be vacated (Tr. 253). The Court notes that at trial, counsel for the parties both agreed and conceded that the modified stipulation was never filed with the Clerk of Suffolk County. After closing, Mr. Weiss testified that he moved the shed within the 180-day time period provided in the stipulation and modified stipulation (Tr. 187). Mr. Weiss also testified that he caused new docks to be installed, which were held in place by new pilings that were situated between eighteen inches and two feet to the south, "so it was clear of the property line" (Tr. 192).

Additionally at trial, counsel for plaintiff read into the record a portion of an affirmation of Weiss' counsel, dated July 26, 2007, as a judicial admission, which affirmation was submitted in support of Weiss' motion for summary judgment on their third affirmative defense. Specifically, counsel for plaintiff read paragraph two into the record, which provides in its entirety, "*Stroem seeks to obscure the issues but does not contradict one word of the moving papers. Plain and simple, Stroem seeks to set aside a boundary line agreement and stipulation of discontinuance that settled a prior action. Defendant's (sic) agree that the boundary line agreement was not signed by Stroem in the form in which they signed it. They agree that it was materially altered at the closing between the defendant's (sic) Plackis and defendant's (sic) Judge*" (Tr. 117-118). Further, counsel read a portion of paragraph eight of the same affirmation into the record, also as a judicial admission, as follows: "*[d]efendants do not dispute that the stipulation was altered by their attorney, William Price, as Stroem says*" (Tr. 122).

III. CONCLUSIONS OF LAW:

To establish the existence of a contract under New York law, a plaintiff must allege an offer, acceptance, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms (*see e.g. Kowalchuk v Stroup*, 61 AD3d 118 [2009]). Further, it is well-settled that the statute of frauds prohibits the transfer of an interest in real property without a written contract signed by the party to be charged (General

Obligations Law § 5-703 [1]; see e.g. *Pinkava v Yurkiw*, 64 AD3d 690 [2009]). Any modification to a contract concerning real property must also be in writing signed by the party to be charged (General Obligations Law § 5-703 [2]; *Gold Coast Homes at Evert St., Inc. v Cannuscio*, 62 AD3d 748 [2009]). Notwithstanding the foregoing, an agreement not in writing and signed by the party to be charged may still be enforceable where there has been part performance unequivocally referable to the contract by the party seeking to enforce the agreement (see e.g. *Korin Group v Emar Building Corp.*, 291 AD2d 270 [2002]).

Here, the handwritten modifications of the stipulation are contained in paragraphs three and four thereof, and are as follows:²

3. The parties hereto acknowledge and agree that, the southern most boundary of the Stroem Property, the northern most boundary of the Plackis Property running on a course S 73° 02' 10" W extends easterly along said course **for the purposes of this Agreement assume it extends** into Sterling Basin as indicated on the Survey.

4. The parties hereto acknowledge and agree that the wood pilings and floating dock erected by Defendant located partially on the south easterly portion of the Stroem Property and located partially on the north easterly portion of the Plackis Property; **to the extent they are north of the boundary line, if at all;** shall be permitted to remain as presently located on the Survey. In connection therewith, the parties hereto further acknowledge and agree that said continued use of that portion of the Stroem Property may expressly continue with the **irrevocable** consent and permission of the Plaintiff. The continued use of that portion of the Stroem Property by Defendant, the Contract Vendees and their heirs, distributees and successors and/or assigns shall not be deemed to be notorious, open, hostile and without the permission of the Plaintiff so as

² The handwritten modifications to the stipulation are indicated in **bold** and underline.

to create a claim of adverse possession by the Defendant, the Contract Vendees, their heirs, distributees and successors and/or assigns with respect to that portion of the Stroem Property upon which the wood pilings and floating dock encroach.

As discussed hereinabove, plaintiff testified that he did not authorize any of the handwritten modifications to the stipulation, and thus did not authorize anyone to place his initials next to the handwritten modifications (Tr. 63). This testimony was uncontroverted. Moreover, Mr. Weiss testified that the original stipulation delivered to the closing was not what he had agreed to previously (Tr. 176). The Court finds that the unilateral modifications of the stipulation by Weiss constituted a counter offer which plaintiff never accepted (*Harper v Rodriguez*, 272 AD2d 372 [2000]). Therefore, the testimony and evidence reveal that there was no meeting of the minds with respect to all essential terms of the stipulation (see *Harper v Rodriguez*, 272 AD2d 372, *supra*).

Moreover, the last sentence of the stipulation and modified stipulation provides that “[t]his Stipulation may not be changed or modified in any manner or form except by written document signed by all parties hereto.” Parties to a written agreement who include a proscription against oral modification are protected by General Obligations Law § 15-301 (1) (see *Rose v Spa Realty Associates*, 42 NY2d 338 [1977]). Any contract containing such a clause cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought (see *Rose v Spa Realty Associates*, 42 NY2d 338, *supra*). It is uncontroverted that the modifications of the stipulation were not contained in a written document signed by all parties thereto. Thus, plaintiff’s first cause of action seeking to have the modified stipulation vacated and set aside is hereby **GRANTED**.

Plaintiff also seeks punitive damages in the amount of \$5 million plus reasonable attorneys’ fees, based upon the “wanton, malicious and intentional” actions of defendants in “fraudulently” altering the stipulation. Punitive damages are available only in those limited circumstances where it is necessary to deter a defendant and others like him from engaging in conduct that may be characterized as “gross” and “morally reprehensible,” and of “such wanton dishonesty as to imply a criminal indifference to civil obligations’ ” (*Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603 [1994], quoting *Walker v Sheldon*, 10

NY2d 401 [1961]). Although the conduct alleged implies a certain level of moral indifference, the Court finds that punitive damages are not warranted herein. As such, plaintiff's second cause of action for punitive damages is **DENIED**.

With respect to Weiss' affirmative defenses, the Court finds that Weiss' first affirmative defense of consent on the part of plaintiff must fail, in that the record is devoid of any evidence to demonstrate that plaintiff consented to the modifications of the stipulation. Weiss' second affirmative defense of estoppel must similarly fail for lack of proof in the record. Weiss' third affirmative defense, which alleges adverse possession and partial performance of moving the shed is unavailing, as the movement of the shed was part of the original stipulation, and was not unequivocally referable to the handwritten modifications (see *Korin Group v Emar Building Corp.*, 291 AD2d 270, *supra*). Moreover, part performance is only available in an action seeking specific performance of a contract (see General Obligations Law § 5-703 [4]; see e.g. *Stainless Broad. Co. v Clear Channel Broad. Licenses, L.P.*, 58 AD3d 1010 [2009]), which is not the case herein. Further, at trial, the Court took judicial notice of the Order of August 23, 2007 (Tr. 8), which held, among other things, that the stipulation precludes Weiss from asserting a claim by prescription. Finally, Weiss' fourth affirmative defense of unclean hands must also fail, as the alleged misconduct on the part of plaintiff, to wit: the removal of a pole with an electrical box, was not misconduct at all, as the pole was located on plaintiff's property (Tr. 105-107), and there was no testimony or evidence of any other conduct constituting unclean hands on plaintiff's part.

With respect to Weiss' counterclaim seeking treble damages in the amount of \$1.5 million relative to the costs of defendants' renovations of their marina, and the loss of use of the marina, including the revenues derived therefrom, as discussed, Weiss withdrew that portion of the counterclaim concerning loss of use of the marina (Tr. 213-214), and failed to adduce evidence at trial regarding any damages suffered by Weiss in connection with the costs of renovations. Accordingly, on this record, Weiss' counterclaim is **DENIED**.

Plaintiff and Weiss both argue in the alternative that the prior action should be restored. In view of the foregoing, it is

ORDERED that the stipulation is hereby vacated and set aside; and it is further

ORDERED that the prior action under Index No. 1778/2002 is hereby restored to the Court's active calendar; and it is further

ORDERED that plaintiff is directed to add STEPHEN J. WEISS, KATHLEEN J. WEISS and JUDGE, WEISS & ASSOCIATES, INC. as party defendants in the restored action, as they may be inequitably affected by a judgment rendered therein (see CPLR 1001 [a]); and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and Order on the Special Term Clerk's Office of the Supreme Court.

The foregoing constitutes the decision and Order of the Court.

Dated: March 3, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court