

<b>Pluschau v Pluschau</b>
2010 NY Slip Op 30812(U)
April 12, 2010
Supreme Court, Greene County
Docket Number: 06-1093
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT  
GARY PLUSCHAU,

COUNTY OF GREENE

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 06-1093**  
**RJI NO. 19-09-4231**

RAYMOND PLUSCHAU & HELGA PLUSCHAU,

Defendant.

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Supreme Court Greene County All Purpose Term, March 12, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

On July 30, 2009 this partition action was settled by, what the parties refer to as, an open court stipulation (hereinafter "Stipulation"). Raymond Pluschau (hereinafter "Raymond") now moves for specific performance of the Stipulation, alleging that his brother Gary Pluschau (hereinafter "Gary") and his mother Helga Pluschau (hereinafter "Helga") violated the Stipulation's terms. Gary and Helga both oppose the motion, and cross move for an interpretation of the Stipulation. Raymond opposes the cross motion. In addition, all of the parties move for attorney's fees. Because Raymond failed to demonstrate his entitlement to

specific performance, his motion is denied. Gary and Helga, however, demonstrated the propriety of their proposed interpretation and their motion is granted. Additionally, on this record, no party demonstrated their entitlement to attorney's fees.

A "stipulation placed on the record is a contract, subject to the principles of contract interpretation. Where the terms are clear and unambiguous, the intent of the parties is to be gleaned solely from the language of the agreement." (Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 46 AD3d 1251 [3d Dept. 2007]). Here, although not all of the Stipulation's terms are well defined, the parties' intent may be gleaned from the Stipulation as a whole. (Marshall v. Khan, 53 AD3d 765 [3d Dept. 2008]).

The Stipulation adequately sets forth a chronological series of requirements. First, the parties are required to obtain a survey of the property at issue, dividing the 11.69 acre parcel of jointly owned property (hereinafter "disputed property") into three separate parcels (one for each party). The Stipulation then requires the parties to secure subdivision approval from the Town of Catskill for the three surveyed lots. Next, the parties agreed to obtain a valuation of each parcel. Lastly, each party would obtain ownership of their approved lot by a signed deed and, at that time, the parties would make monetary payments to each other to equalize the value of the lot each party received.

Raymond's motion seeks specific performance of the Stipulation's first two steps, i.e. the survey and subdivision approval. He supports his motion with his attorney's affidavit and its attachments, but no further factual affidavit was initially submitted.<sup>1</sup> As Raymond's attorney's

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<sup>1</sup>In reply, Raymond submits his own and a professional engineer's affidavit. As reply papers are not designed to raise new arguments, to the extent that these reply papers do they are not considered. (Alb. Co. Dept. of Social Serv. v. Rossi, 62 AD3d 1049 [3d Dept. 2009]).

affidavit is filled with inadmissible hearsay allegations and speculative conclusions, it is of limited probative value. (*See generally* Gray v. South Colonie Central School Dist., 64 AD3d 1125 [3d Dept. 2009], 2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009], Zuckerman v. City of New York, 49 NY2d 557 [1980]).

On this record, Raymond established that the initial survey of the disputed property contained two parcels instead of three as required by the Stipulation. Although that initial surveyor agreed to correct his error, he never provided a modified survey. Such undisputed facts do not, however, demonstrate Gary and Helga's violation of the Stipulation. This record contains no admissible proof linking the surveyor's errors and non-completion with any acts of Gary or Helga. Rather, the record demonstrates that this surveyor was chosen jointly by all of the parties. Raymond's attorney's unsupported, speculative and conclusory allegations about Gary's intentions and desires fails to sufficiently demonstrate a violation of the Stipulation.

Moreover, considering the attachments to Gary and Helga's opposition papers, they immediately complied with Raymond's demand to obtain a new surveyor and paid for their portion of same. On this record, Raymond has failed to demonstrate that Gary and Helga violated the Stipulation's survey term or his entitlement to specific performance of this portion of the Stipulation.

Raymond likewise failed to demonstrate that Gary and Helga violated their obligation to apply for subdivision approval. Raymond's attorney's affidavit alleges that a survey and a subdivision application were provided to Gary and Helga on approximately October 1, 2009, and that such application was wrongfully rejected. Raymond's initial moving papers fail to attach the survey or subdivision application Gary and Helga were allegedly provided. Nor do his moving

papers demonstrate the propriety of such survey and subdivision application, or why Gary and Helga's rejection was wrongful. Rather, attached to Raymond's moving papers is a fax from Gary and Helga's attorney, dated November 13, 2009, noting that the subdivision application provided to them was blank. Moreover, Gary and Helga's opposition papers explain that at no time have they received complete subdivision application forms from Raymond. Because the Stipulation does not require Gary and Helga to sign a subdivision application in blank, Raymond failed to demonstrate Gary and Helga's violation of the Stipulation or his entitlement to specific performance.

Turning to Gary and Helga's cross motion, they duly demonstrated their entitlement to an Order interpreting the Stipulation. The first requirement of the Stipulation unambiguously requires the creation of a survey depicting three separate parcels divided from the disputed property. Only Helga's parcel was defined with any specificity, granting her a one and one half acre parcel surrounding the home she currently lives in. Other than requiring compliance with setbacks, Helga's parcel was not otherwise defined. The parties further agreed that the boundary line between Gary and Raymond's parcels would generally run along a line the parties marked on a map that was attached to the Stipulation as an exhibit. No definite boundary line was drawn, nor was any specific acreage agreed to. Rather, Raymond's parcel was described as that portion of the disputed property "generally running along the eastern and northern part of the parcel." With Gary's parcel being defined as "generally... to the western side of the property and in the middle of the property."

With such illdefined property boundaries, the cross motion seeks to resolve whether or not the lot Helga receives under the Stipulation includes the septic system currently servicing her

home. The Stipulation does not specifically address this issue. However, the intent of the parties can be gleaned from the entire agreement, which requires its inclusion in Helga's parcel.

The Stipulation clearly contemplates each party receiving a residential lot, with that party obligated to improve their own lot. The Stipulation is also unequivocal in providing a 1.5 acre lot surrounding Helga's home, for her use. While the proposed survey submitted on this record depicts Helga's home within a 1.5 acre lot, it inexplicably excludes a portion of the septic system that currently services her home. Instead, the survey depicts Helga's septic system and seepage pit extending approximately 40 feet onto Raymond's lot. The Stipulation does not specify that such 1.5 acre parcel be drawn in such a manner, no natural markings on the survey dictate its proposed boundary line nor does logic require such result. This exclusion is an unreasonable interpretation of the Stipulation's terms. Rather, the Stipulation contemplates a survey which depicts a 1.5 acre parcel surrounding Helga's home, inclusive of the septic system that services it.

To the extent that the parties' motions hypothesize about the results of their future subdivision application and argue about whether Helga's septic system will be approved, such arguments are wholly speculative, premature and irrelevant to an interpretation of the Stipulation. The Stipulation requires a survey, a subdivision application and for each lot to be improved at its owner's expense. The Stipulation does not provide one party with the authority to mandate a specific improvement on another party's property. As such, to the extent that the parties' papers address such issue, their arguments are irrelevant and not considered.

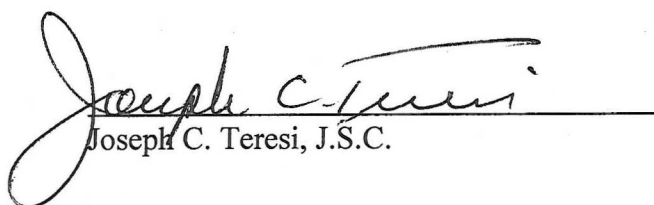
Accordingly, Gary and Helga's cross motion is granted. The parties' Stipulation is interpreted as requiring the 1.5 acre parcel that is created around Helga's home, to include the septic system that is currently existing and servicing her home.

Lastly, neither party demonstrated their entitlement to attorney's fees. The Stipulation provides that: "[t]o the extent it becomes necessary for any one of the parties to commence an action to enforce the terms of the stipulation for whatever violation there may be and they are the successful party in enforcing the agreement, they shall be entitled to recover their own attorney's fees that were incurred in connection with that enforcement proceeding." On this motion Raymond is not "a successful party in enforcing the agreement", and as such is not entitled to attorney's fees. Nor are Gary and Helga entitled to attorney's fees because, although they were "successful part[ies]", their motion sought an "interpretation" not "enforcement". As such, the attorney's fee provision of the Stipulation does not apply.

This Decision and Order is being returned to the attorney for Gary and Helga. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 12, 2010  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated January 22, 2010, Affidavit of Paul Freeman, dated January 21, 2010, with attached Exhibits A-L
2. Notice of Cross Motino, dated February 12, 2010, Affidavit of Ewald Schwarzenegger, dated February 12, 2010, with attached Exhibit A, Affidavit of Gary Pluschau, dated February 12, 2010, Affidavit of Helga Pluschau, dated February 12, 2010, Affidavit of John Winans, dated February 12, 2010, with attached Exhibits A-S.
3. Affidavit of Scott Lane, dated March 11, 2010, Affidavit of Raymond Pluchau, dated March 12, 2010, Affidavit of Paul Freeman, dated March 12, 2010, with attached Exhibits A-V.