

Dumann Realty, LLC v Stareshefsky

2010 NY Slip Op 31083(U)

April 30, 2010

Supreme Court, New York County

Docket Number: 106434/2008

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 106434/2008
DUMANN REALTY LLC
vs.
STARESHEFSKY, JOSEPH
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided with
Attached memorandum decision.

FILED

MAY 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: *Saliann Scarpulla*

4/30/10
SALIANN SCARPULLA *L.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST. REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
DUMANN REALTY, LLC

Plaintiff,

Index No.: 106434/2008
Submission Date: 4/21/10

- against-

JOSEPH STARESHEFSKY,

DECISION AND ORDER

Defendant.
-----X

For Plaintiff:
Sarno & Defelice, LLC
253 West 23rd Street, 5th Floor
New York, New York 10011

For Defendant:
Naimark & Tannenbaum
169-95 137th Avenue
Rochdale Village, New York 11434

Papers considered in review of this motion to restore:

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Reply Aff 4

HON. SALIANN SCARPULLA, J.:

In this action to recover a real estate broker's fee, plaintiff Dumann Realty, LLC ("Dumann") moves to restore this action to the active calendar and to enforce the terms of the settlement agreement entered into between Dumann and defendant Joseph Stareshefsky ("Stareshefsky").

On or about May 8, 2008, Dumann filed a summons and complaint initiating this action, seeking payment of a brokerage fee in the amount of \$59,720 plus interest.

Stareshevsky filed a *pro se* verified answer on or about June 3, 2008, and on or about

August 1, 2008 Dumann moved for summary judgment on its complaint. Stareshesky, represented by counsel, opposed the motion. This Court (Lehner, J.) denied the motion for summary judgment on January 15, 2009.

Subsequently, on or about June 16, 2009 the parties entered into a settlement agreement. In the settlement agreement the parties agreed to a payment schedule whereby Stareshesky agreed to pay Dumann \$4,000.00 contemporaneously with the execution of the Settlement agreement, and “[t]he additional sum of \$2,000.00 per month for twenty (20) consecutive months commencing on the 15th of the month following the date that this Stipulation is executed.” The Settlement agreement also provides that, “it is agreed by and between the parties hereto that the monthly installment payments to be made by the defendant to the plaintiff are subject to the defendant receiving his full monthly rental payments from the tenant occupying the subject premises. . . .”

The settlement agreement further provides that:

In the event that the defendant does not receive the full monthly payments from [the tenant] for any particular month, the defendant, within thirty (30) days thereafter shall forward a signed and notarized statement to Dumann Realty. . . attesting to the fact that the rental payment has not been received for that particular month.

A default is defined in the Settlement agreement as “either fail[ure] to make the \$2,000.00 monthly payment to the plaintiff, or, in the alternative, . . . fail[ure] to provide to the plaintiff the written statement as required herein.” In the event that defendant is “in default by more than thirty (30) days . . . , the plaintiff shall be entitled to enter Judgment

against the defendant upon forty-five (45) days written notice for the entire sum outstanding pursuant to the terms of this agreement.”

The parties entered into a stipulation of discontinuance, dated June 16, 2009, which was filed with the court on or about August 9, 2009. The stipulation of discontinuance provides, in pertinent part, that the “action . . . is discontinued, without costs to either party a against the other.” There is no mention of whether the discontinuance is with or without prejudice.

After execution of the settlement agreement, on or about July 23, 2009, Dumann received from Stareshesky an affidavit attesting that no rent had been paid by the tenant for the month of July 2009, and as a result and pursuant to the terms of the settlement agreement, he would not be making a \$2000.00 payment to Dumann for the month of July 2009.¹

Dumann then received an affidavit from Stareshesky on or about September 22, 2009, in which he stated that he had received only \$7,500 for September 2009², and accordingly he would not be paying Dumann \$2,000.00 for September 2009. In the affidavit, Stareshesky further stated that on September 21, 2009, he received three checks from the tenant, each in the amount of \$7,5000 for the July 2009, August 2009

¹ On June 29, 2009, Stareshesky initiated an eviction proceeding against the tenant for non-payment of rent.

² Pursuant to the rent schedule submitted by Stareshesky, the rent for this period should have been \$9,540 per month.

and September 2009 rents. In his affidavit submitted in opposition to this motion, Stareshesky states that upon receipt of the three checks in September 2009, he withdrew the eviction proceeding against the tenant.

Upon receipt of the September 2009 affidavit, on or around September 28, 2009, Dumann's counsel sent a letter to Stareshesky's counsel demanding \$6,000.00 in fees for the months July, August and September 2009. Stareshesky responded, through a letter from his counsel, explaining that he was not obligated to make the demanded payments pursuant to the settlement agreement, because he had not received the full month's rent for the months at issue. Dumann's counsel sent another letter, claiming that Stareshesky was in default and demanding payment for the three missed months.

When it failed to received the claimed payments, Dumann served this motion to restore this action to the active calendar, and to enforce the terms of the settlement agreement. Dumann argues that the terms of the Settlement agreement "induced the plaintiff to effect the Stipulation of Discontinuance" In addition, Dumann argues that the three payments of \$7,500.00 each received in September 2009 constitute full payments for July 2009 and August 2009, and a partial payment for September 2009, and as a result Stareshesky owes Dumann \$4,000.00 (\$2,000.00 for each of the 2 months for which he received full rent). Further, in the correspondence submitted, and in a conference with the Court, Dumann intimates that Stareshesky has arranged with the

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tenant to receive less than the full rent so as to avoid making payments to Dumann under the terms of the Settlement agreement.

In opposition to the motion to restore, Stareshefsky argues that the motion is inappropriate where, as here, a Settlement agreement fully resolved the action and a Stipulations of Discontinuance has been filed. Stareshefsky argues that the appropriate method for plaintiff to seek to enforce the settlement agreement is to commence a plenary action. In the alternative, Stareshefsky argues that the motion should also be defeated on the merits, as the defendant is not in default under the terms of the Settlement agreement.

Discussion

It is well settled that the “power of a trial court to exercise supervisory control over all phases of pending actions and proceedings . . . [includes] discretionary power to relieve parties from the consequences of a stipulation effected during litigation.” *White House Manor, Ltd. v. Benjamin*, 11 N.Y.3d 393, 401 (2008) (quoting *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 54-55 (1979)). “Generally, the presumption is that an action is not automatically terminated merely because a settlement has been reached, and this ‘presumption may be overcome only by an express, unconditional stipulation of discontinuance.’” *Patel v. Orma*, 190 A.D.2d 782 (2d Dep’t 1993) (quoting *Teitelbaum*, 48 N.Y.2d at 56). Only “absent such an unconditional stipulations of discontinuance, [is] the plaintiff entitled to seek enforcement of the settlement stipulation by motion in the underlying action.” *Patel*, 190 A.D.2d at 78. Otherwise, the plaintiff must seek redress in

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a newly commenced separate plenary action. *Herald Square Foot care Assocs., Inc., v. Indemnity Ins. Co. of North America*, 257 A.D.2d 551, 552 (1st Dep't 1999).

As has been noted, the Court of Appeals in *Teitelbaum* “held that the key factor to a courts’ retention of supervisory power over an action and its ability to aid in enforcement of a stipulation was whether the action had actually terminated. In this regard, it noted that a settlement agreement would terminate an action if it contained an express stipulation of discontinuance or if a judgment was actually entered in accordance with its terms.” *DiBella v. Martz*, 58 A.D.3d 935, 946 (3d Dep’t 2009) (citing *Teitelbaum*, 48 N.Y.2d at 53).

Here, the parties entered into and filed a stipulation of discontinuance, which terminated the action. *See Lazare v. Pfizer*, 257 A.D.2d 498 (1st Dep’t 1999) (“plaintiff’s action was terminated by the filing [of] an express stipulation of discontinuance executed by both parties and the scheduling of court conferences could not revive the previously terminated action”) (citations omitted). In addition, the parties entered into a settlement agreement which provides that it “is in full and complete satisfaction of the cause of action brought by the plaintiff against the defendant.” Accordingly, as the underlying action was terminated by the parties, the plaintiff cannot seek relief by motion, but must instead bring a plenary action for enforcement of the terms of the Settlement Agreement. *See, e.g., Urso v. Panish*, 94 A.D.2d 701, 702 (2d Dep’t 1983).

In accordance with the foregoing, it is

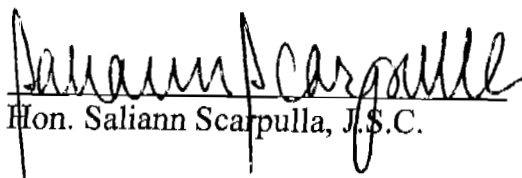
[* 8]

ORDERED that plaintiff Dunmann Realty LLC's motion to restore the matter to the active calendar and to enforce the terms of the settlement agreement entered into between Dumann and defendant Joseph Stareshesky is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
April 30, 2010

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
MAY 05 2010
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COUNTY CLERK'S OFFICE