

Pilossoph v Hedges

2010 NY Slip Op 31192(U)

May 19, 2010

Supreme Court, Greene County

Docket Number: 99-155

Judge: Joseph C. Teresi

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SATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE
HARRY PILOSSOPH and CONSTANCE PILOSSOPH,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 99-155
RJI NO. 19-99-8509

BRADFORD HEDGES, NICOLINO BUOSCIO, and
THE ASSOCIATION OF PROPERTY OWNERS OF
SLEEPY HOLLOW LAKE, INC.,

Defendants.

JOHN DORRITIE and DANIELLE DORRITIE,

As intervening defendants pursuant to
CPLR §§1012 and/or 1013

Supreme Court Greene County All Purpose Term, April 30, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Anderson Byrne
Elizabeth Byrne-Chartrand, Esq.
Attorney for Plaintiffs
48 Union Avenue, Suite 1
Saratoga Springs, New York 12866

Boggeman, George & Corde, PC
Paul Hurley, Esq.
Attorney for Defendant Hedges
39 North Pearl Street, Suite 501
Albany, New York 12207

Dreyer Boyajian, LLP
John Casey, Esq.
*Attorney for Defendant The Association of
Property Owners of Sleepy Hollow Lake, Inc.*
75 Columbia Street
Albany, New York 12210

TERESI, J.:

This trespass, injunction and damages action was settled by an open court stipulation (hereinafter “Stipulation”) on January 24, 2005. Plaintiffs now move to enforce the Stipulation.¹ While defendants Bradford Hedges (hereinafter “Hedges”) and The Association of Property Owners of Sleepy Hollow Lake, Inc. (hereinafter “APO”) oppose the motion, neither defendant Nicolino Buoscio (hereinafter “Buoscio”) nor intervening defendants John and Danielle Dorritie (hereinafter “Dorritie”) submit opposition papers. Because Plaintiffs demonstrated their entitlement to part of the relief they seek, their motion is granted in part.

“[S]trict enforcement [of settlement agreements] not only serves the interest of efficient dispute resolution but is also essential to the management of court calendars and integrity of the litigation process.” (IDT Corp. v. Tyco Group, 13 NY3d 209, 213-14 [2009], quoting Hallock v. State of New York, 64 NY2d 224 [1984]). “Stipulations of settlement must be construed in accordance with contract interpretation principles... and [i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance.” (Ochal v. Television Technology Corp., 26 AD3d 575, 576 [3d Dept. 2006] quoting 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002], citing McCoy v. Feinman, 99 NY2d 295 [2002]).

The Stipulation settling this action granted Plaintiffs, in part, the ability to excavate and restore their shoreline, which was wrongfully excavated by Buoscio in 1998. The Stipulation specifically allows Plaintiffs to “restore the excavated area, said area to be restored to the same condition it was on the date before the defendants construction, 10/23/98, pursuant to plans to be

¹ Plaintiff’s previous motion seeking this same relief was denied, without prejudice, due to their failure to properly serve the motion. Their motion has now been properly served.

submitted by Vernon Hoffman.” The Stipulation further outlines the approval process for such “plans” by stating “the plans will be submitted to the defendants’ attorneys who will have 10 days to submit comments, suggestions and requests for modifications. Mr. Hoffman will consider said request and will submit his final plans for review by the Court.”

It is uncontested that the remediation “plans” have been reviewed and approved in accord with the Stipulation’s specific provisions. This Court entered a Consent Order, dated October 29, 2007 (hereinafter “Consent Order”), incorporating Vernon Hoffman’s “plans.” Neither Hedges nor the APO challenged the entry or the substance of the Consent Order at the time of its execution, or in opposition to this motion. Likewise, neither Hedges nor the APO controvert Plaintiffs’ allegation that each received Vernon Hoffman’s “plans” more than ten days prior to their submission to the Court but made no comments, suggestions or requests for modifications. Because all of the parties have acquiesced to the Consent Order and its “plans”, the Stipulation requires the “plans” implementation.

Here, Plaintiffs demonstrated their entitlement to an Order enforcing the Stipulation’s remediation “plans”, as against Hedges. Plaintiffs allege that Hedges breached the Stipulation and prevented their restoration of the excavated area, by storing his boats in or near the area to be restored. In support of their motion Plaintiffs submit Mr. Pilossoph’s affidavit, the affidavit of an engineer who prepared a portion of the Consent Order “plans” and an affidavit from the contractor hired to perform the restoration work. Such affidavits unequivocally demonstrate that Hedges has intentionally stored his boats in or near the area to be restored; that the Consent Order “plans” require a clear site for restoration work to commence; and that the restoration work cannot be commenced or completed while Hedges’ boats are in or near the area to be restored.

Such proof amply proves that Hedges continued placement of his boats in or near the restoration work area contravenes both the intent of the Stipulation and his covenant of good faith and fair dealing. (Ochal, supra). As such, Plaintiffs sufficiently demonstrated their entitlement to an Order enforcing the parties' Stipulation.

In opposition, Hedges failed to rebut Plaintiffs' showing. Hedges does not offer his own affidavit in opposition. Instead, he relies solely on his attorney's affirmation and its exhibits. Because Hedges' attorney does not allege personal knowledge of Hedges good faith and fair dealing herein, his affirmation is of no probative value on this fact issue. (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]). Similarly unavailing are Hedges' legal arguments. Hedges first correctly notes that the Stipulation does not specifically prohibit his docking boats in the restoration area. However, he failed to demonstrate that the parties' intended to allow his continued use of the restoration area, while the restoration work was being performed, which effectively prevents any restoration work and nullifies this term of the Stipulation. Hedges next argument, that Plaintiffs are seeking more than they are entitled to under the Stipulation, has either been waived or misconstrues Plaintiffs' motion. On this motion, Plaintiffs seek only an order allowing the Consent Order's "plans" to be implemented, nothing more. As Hedges does not object to the Consent Order, entered on his consent, Hedges presumption that Plaintiffs are seeking to remediate more than what has been agreed to is unsupported. Similarly defective is Hedges' argument that the issues raised herein are precluded by operation of this Court's prior denial of Plaintiff's contempt motion. The current motion seeks a different remedy, applies a different standard, is based upon a different record and, as such, is not controlled by this Court prior contempt determination.

Hedges did demonstrate, however, that the permanent injunction remedy Plaintiffs seek is too broad. Neither the Stipulation nor the Consent Order entitle Plaintiffs to a permanent injunction forever limiting Hedges' use of his boats. Rather, Plaintiffs are entitled only to that amount of injunctive relief that allows the restoration work to be performed in accord with the Stipulation and Consent Order's "plans." As such, Plaintiffs' shall submit a proposed order within twenty days of the date of this Decision and Order, on seven days notice to all parties and served by overnight mail. The proposed order shall enjoin Hedges' placement or docking of his, or any other, boats in or near the restoration site, or otherwise interfering with the restoration work, beginning on July 15, 2010 and terminating on August 14, 2010, so that the restoration work can begin no sooner than July 15, 2010.

Turning to Plaintiffs claims against APO, Plaintiffs failed to demonstrate their entitlement to an Order enforcing the Stipulation against it. Plaintiffs allege, and APO does not contest, that the APO issued boating stickers to Hedges for the 2009 boating season. Plaintiffs argue, from such fact, that the APO is responsible for Hedges placement of his boats in or near the excavation area. Such argument is unavailing, however, because the boating sticker merely allows access to the commonly owned lake. It does not mandate Hedges' placement of his boats in the excavation area. Moreover, the APO submitted an affidavit demonstrating that Hedges, with the boating sticker, could have docked his boats in alternate locations on the lake. As such, Plaintiffs failed to demonstrate their entitlement to an Order directing the APO to comply with the Stipulation.

Finally, Plaintiffs motion for attorney's fees and Hedges request for attorney's fees are denied. Plaintiffs' and Hedges' supporting papers have been examined for content,

thoroughness, cogent legal arguments, and the results obtained, along with a consideration of the prior motion practice herein, in determining that attorney's fees should not be granted.

Accordingly, to the extent set forth above, Plaintiffs motion is granted. Otherwise, and to the extent not specifically addressed above, the parties' remaining contentions have been examined, found to be lacking in merit and are denied.

This Decision and Order is being returned to the attorney for Plaintiffs. 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: May 19, 2010
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 30, 2010, Affidavit of Paul McCreary, dated March 9, 2010, Affidavit of J.R. Heffner, dated February 19, 2010, Affidavit of Elizabeth Byrne-Chartrand, dated March 29, 2010, with attached Exhibits A-F, Affidavit of Harry Pilosoph, dated March 24, 2010, with attached exhibits A-L.
2. Affirmation in Opposition of Paul Hurley, Esq., dated April 22, 2010, with attached exhibits A-D.
3. Affidavit of John Casey, dated April 22, 2010, Affidavit of Jeffrey DeJarnette, dated April 19, 2010, with attached Exhibit A.
4. Affidavit of Elizabeth Byrne-Chartrand, dated April 27, 2010, with attached Exhibit A,