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SHORT FORM ORDER **INDEX NO. 09128/2007**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

LEON PETROLEUM, INC.

Plaintiff(s),

-against-

GULF OIL LIMITED PARTNERSHIP

Defendant(s).

ORIG. RETURN DATE: April 7, 2008
FINAL RETURN DATE: May 12, 2008
MTN. SEQ. #: 001-Mot D

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Upon the following papers numbered 1 to 7 read on this motion for the entry of a money judgment: Notice of Motion and supporting papers 1 - 2; Affidavit in Opposition and supporting papers 3 - 7; it is

ORDERED that the motion (001) by the defendant for the entry of a judgment in the amount of $50,000.00 and related relief is granted as follows: it is

ORDERED and ADJUDGED that judgment is granted to the defendant in the amount of $50,000.00 together with interest from January 16, 2008 and said judgment is payable by the plaintiff Leon Petroleum, Inc. of 532 Broadhollow Road, Melville, New York 11747, to the defendant Gulf Oil Limited Partnership in care of its attorneys for this purpose, Archstone Law Group, P.C. at 245 Winter Street, Suite 400, Waltham, Massachusetts 02451-9709; and it is further

ORDERED and ADJUDGED that costs (pursuant to CPLR Articles 81 and 82), and disbursements and additional allowances (pursuant to CPLR 8301[a]) are also awarded and shall be taxed by the Clerk of the Court in accordance with CPLR 8401; and it is further

ORDERED that payment of the judgment awarded herein, along with any costs, disbursements and additional allowances taxed by the Clerk of the Court, as well as the production of any documents required pursuant to the underlying stipulation of settlement, shall be made by the plaintiff within 21 days of the plaintiff being served with a copy of this decision, order and judgment with notice of entry along with a copy of the final judgment entered by the Clerk of Court.

This is a motion for the entry of a judgment of $50,000.00, along with fees, costs and disbursements, brought by the defendant Gulf Oil Limited Partnership (hereinafter Gulf) against the plaintiff Leon Petroleum, LLC (hereinafter Leon). This relief is based upon Gulf's reliance upon a stipulation of settlement (fully executed as of December 26, 2007) (hereinafter the stipulation) which resolved the underlying dispute between Leon and Gulf.

Leon (as a broker for what was originally one gas station in Freeport and subsequently added a second gas station in Massapequa) entered into a broker contract and addendum with Gulf on May 14, 2002 by which Leon agreed, inter alia, to broker the sale of Gulf gasoline products to the gas stations specified in the contract for a period of ten years. As part of the May 14, 2002 broker contract, a promissory note was issued that same day.

On August 17, 2004, the parties agreed to another addendum (adding the Massapequa gas station) to the broker agreement and first addendum along with another promissory note of even date.

Subsequently, a dispute arose between Leon and Gulf over alleged incentives to be paid by Gulf to Leon. The parties settled the underlying dispute and signed a stipulation of settlement (which became fully signed on December 26, 2007). The terms of the settlement included, inter alia, that,

> "[Leon, the plaintiff] shall pay the sum of $50,000.00 in full settlement of all claims between the parties, other than those specifically set forth in paragraph 2 herein, including but not limited to: (I) all claims by [Leon] against [Gulf] arising out of a certain May 14, 2002 Broker Contract and Addendum; (ii) all claims by [Leon] against [Gulf] arising out of a certain August 17, 2004 Addendum; (iii) all claims by [Gulf] against [Leon] arising out of a certain May 14, 2002 Promissory Note; and (iv) all claims by [Gulf] against [Leon] arising out of a certain August 17, 2004 Promissory Note" (Stipulation of Settlement, Dec. 26, 2007, ¶1).

The May 14, 2002 and August 17, 2004 agreements both concern the agreement between Leon and Gulf regarding the brokering of sales of Gulf gasoline products to the gas stations covered by the agreements. The corresponding promissory notes are from Leon to Gulf to ensure the payments called for in the agreements.

The claim set forth in Paragraph 2 of the stipulation - which is not covered by the settlement - is with regard to a claim between one of the gas stations and an abutting establishment in which there was an issue of installing curbs between the two properties to provide protection from gasoline spills or leaks. This claim also extended to any environmental issues arising from that dispute.

Paragraph 3 provides for the payment of the $50,000.00 twenty-one days from the date the stipulation is fully executed (that is, the payment was due on January 16, 2008).

Paragraph 4 provides, inter alia, that the agreements and promissory notes mentioned in paragraph 1 would be "terminated as of December 31, 2007."

Paragraph 5 requires the parties to "execute mutual General Releases" which will be held in escrow by the respective attorneys until the settlement funds are received by Gulf. And paragraph 6 provides that,

> "Simultaneous with payment of the stipulated amount, Plaintiff [Leon] shall deliver to Defendant [Gulf] a Stipulation of Discontinuance With Prejudice for the within action and Defendant [Gulf] shall file same with the Court."

The referred to Broker Contract was good until 2012. The result of this settlement was that Gulf would be paid $50,000.00 on or before January 16, 2008 and the agreements, along with the promissory notes relative to the agreements, would be terminated as of December 31, 2007, thus severing the contractual relationships between Leon and Gulf as of that date.

According to Leon (as stated in an affidavit submitted on this motion by counsel for Leon), one of the gas stations covered by the agreement (located in Massapequa) was leased to Shehar Petroleum, Inc. (hereinafter Shehar). Shehar had its own franchise agreement with Gulf which was subject, inter alia, to the Broker Contract between Leon and Gulf.

Counsel for Leon also states that on January 1, 2008 - before the $50,000.00 payment was due or paid - Leon and Shehar entered into a lease surrender agreement. Then, "within days" of the signing of the lease surrender agreement, and still before the $50,000.00 was due, Gulf "indicated it intended to make claims (1) against [Leon] for tortious interference with [Gulf's] franchise agreement and (2) against [Shehar] for violating the said franchise agreement which was subject to . . . the broker agreement between [Leon] and [Gulf].

Indeed, Leon submits on this motion a copy of a letter from Gulf's counsel, dated January 2, 2008, to counsel for Leon, stating that Gulf has "been advised" that the president of Shehar told a certain named Gulf sales representative that Shehar was going to change gasoline brands and that the change was "occurring at the direction of your client [a named principal of Leon]." Gulf's counsel advised Leon's counsel that the termination of the Broker Contract pursuant to the stipulation of settlement between them "does not serve to terminate the Product Sales Agreement" between Shehar and Gulf which, according to Gulf's counsel, can only be terminated by mutual agreement of Gulf and Shehar or other appropriate grounds under federal law.

Counsel for Gulf ended the letter by asking Leon's counsel to:

> "advise your client to cease and desist immediately from any actions that could be construed as intentional interference with contractual relations between Gulf and Shehar. If your client persists in his efforts to debrand the Shehar station in Massapequa, Gulf will have no choice but to pursue its legal and equitable remedies against Leon and Shehar in connection with this matter."

Based upon this letter, Leon takes the position that Gulf has breached that part of the stipulation of settlement which settled all claims arising out of the specified agreements mentioned therein between Gulf and Leon by now threatening to bring a claim arising out of those very agreements. Leon, consequently, refused to make the $50,000.00 payment.

Gulf brings this motion for the entry of judgment in the amount of $50,000.00 and related relief.

It is well settled that "Stipulations of settlement which put an end to litigation are favored by our courts and will not be set aside in the absence of fraud, collusion, mistake, or such other factors as would vitiate a contract [citations omitted]" (*Ramnarian v Ramnarian,* 46 AD3d 655, 846 NYS2d 668 [2d Dept 2007], *lv dismissed* 10 NY3d 785, 857 NYS2d 20 [2008]; *see also IDT Corp. v Tyco Group, S.A.R.I.,* 13 NY3d 209, 890 NYS2d 410 [2009]; *Hallock v State of New York,* 64 NY2d 224, 230, 485 NYS2d 510 [1984]).

Here, in relying on Gulf's "indicating" that it "intended" to bring a claim against Leon for tortious interference and a claim against Shehar for violating Shehar's franchise agreement with Gulf which was subject to, inter alia, the Broker Contract referenced in the stipulation of settlement between Leon and Gulf, the court concludes that Leon is contending that these factors would vitiate the stipulation of settlement (since there are no allegations of fraud, collusion or mistake). Moreover, such a contention can only be based upon an anticipatory breach of the terms of the stipulation since Gulf had not taken any actual steps of asserting a claim which arguably could be in contradiction of the agreement settling all claims arising from the Broker Contract, addendums and promissory notes referred to in the stipulation. Indeed, Gulf had not at that point commenced any actions of any nature against Leon or Shehar.

The potential actions alluded to in the letter of January 2, 2008 from Gulf's counsel to Leon's counsel are for claims arising out of the franchise agreement between Shehar and Gulf and not for claims arising out of the agreements specified in the stipulation of settlement. While it is contended that the franchise agreement is "subject to" the Broker Contract, that does not rise to the level of the franchise agreement-based claim arising out of the actual Broker Contract.

In the first instance, in New York, an anticipatory breach only gives a party a right to sue for damages or, arguably, to use as an excuse for unilaterally disregarding the terms of an agreement for personal services or for the manufacture or sale of goods (22A NY Jur 2d Contracts §454). The contract here (the stipulation) does not fall under any of these categories and, thus, Leon may not rely upon an anticipatory breach as a legal ground for refusing to make the payment called for in the stipulation.

In any event, in order to qualify as an anticipatory breach, the party allegedly repudiating the agreement must make a "definite and final communication" of its intent to forego performance of the terms of the agreement (22A NY Jur 2d, Contracts §455). Here, an indication by Gulf of an intent to bring future claims unless Leon's counsel advises its client in a manner satisfactory to Gulf is far short of a definite and final communication. The alleged repudiation must be made by "an unqualified and positive refusal to perform, and must go to the whole [contract]' (*id.*). Here, there is no unqualified refusal to perform the terms of the whole agreement and, indeed, as stated herein, the threatened claim arises not out of the agreements referred to in the stipulation but out of a separate agreement between different parties.

From an equitable perspective, in the event Gulf does bring an action against Leon, as alluded to in its letter of January 2, 2008, Leon would be able to avail itself of the defense that such a claim is allegedly barred by the stipulation of settlement. This, of course, assumes that the terms of the stipulation, including the $50,000.00 payment have been complied with and the stipulation is otherwise viable.

In any event, the Broker Contract and the addendums identified in the stipulation would have been (and may yet still be) terminated as of December 31, 2007 contingent upon the $50,000.00 being paid in accordance with this decision, order and judgment.

Indeed, Gulf, which is seeking that payment, can not expect to have the court grant a judgment for the payment pursuant to the stipulation and not expect to have the remaining terms of the stipulation to be in effect, including the termination of the Broker Contract, addendums and promissory notes as provided therein. In short, either Gulf is seeking enforcement of the stipulation or its vitiation. Here, Gulf is seeking its enforcement and, accordingly, must also abide by its terms upon payment of the $50,000.00 as provided herein.

Once payment is made and the identified agreements are terminated as of December 31, 2007 pursuant to the stipulation, how those terminations would impact upon a potential action brought by Gulf arising out of and pertaining to the franchise agreement would have to be determined at that time.

Accordingly, judgment in the amount of $50,000.00 is awarded to the defendant Gulf as provided herein.

This constitutes the decision, order and judgment of the court.

Dated: May 18, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.