

**Stelco Restoration & Technology Corp. v Northside  
Gardens, Inc.**

2011 NY Slip Op 31769(U)

June 28, 2011

Supreme Court, New York County

Docket Number: 106405/2008

Judge: Jane S. Solomon

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

PRESENT: Solomon  
Justice

PART 55

STELCO RESONANCE TECHNOLOGY  
- v - CORP

INDEX NO. 106405/08  
MOTION DATE 3/7/11  
MOTION SEQ. NO. 3  
MOTION CAL. NO. \_\_\_\_\_

NORTHSIDE GARDENS

The following papers, numbered 1 to 6 were read on this motion to/for vacate

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-4</u>
<u>5-6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed  
Memorandum decision and order.

**FILED**

JUN 30 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/28/11

J.S.  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----X  
STELCO RESTORATION & TECHNOLOGY CORP., Index No. 106405/2008

Plaintiff, DECISION & ORDER

-against-

NORTHSIDE GARDENS, INC., and NEW YORK  
CITY DEPARTMENT OF HOUSING PRESERVATION  
AND DEVELOPMENT,

**FILED**

**JUN 30 2011**

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

SOLOMON, J.:

Plaintiff Stelco Restoration & Technology Corp.

(Stelco) sued defendants Northside Gardens, Inc. (Northside) and the New York City Department of Housing Preservation and Development (HPD) for a balance due on an architectural services contract. The contract was in connection with a major renovation project, funded by an HPD loan.<sup>1</sup> HPD was dismissed on motion and the remainder of the lawsuit continued. At a conference before the court on May 3, 2010 counsel entered into a written stipulation of settlement which was so-ordered. The stipulation provided for payment of \$17,750 by July 15, during which Northside was to "make best efforts to obtain payment from HPD." Failing that outcome, the amount due increased at the rate of \$1,000 weekly up to \$35,000, just slightly less than Stelco sought in the complaint. HPD did not agree that \$17,750 was due to Stelco, did not tender what it thought might be a lesser

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<sup>1</sup> There was a separate lawsuit over the contractor's allegedly inadequate work.

amount, and Northside made no payment to Stelco. In December 2010, Stelco demanded payment. This order to show cause followed.

Northside seeks to vacate the settlement on the grounds of fraud and frustration of purpose. It argues that it was defrauded by Stelco's insistence that \$35,000 was due and owing when it was not, so that it should be excused from compliance with the stipulation since Stelco was not entitled to the amount agreed to; moreover, since it only intended to pay what HPD would cover, and HPD would not pay anything, it is entitled to revive the lawsuit on the merits. The dispute over the amount sought by Stelco is the essence of the litigation. Northside's objections to payment now were, or should have been, known to it from its first refusal to pay, through its pleaded answer with counterclaim, and are the very dispute in the lawsuit. Its argument that it could not get information from HPD before it made the agreement is not credible. Execution of the stipulation was a business decision Northside made in open court after negotiations with Stelco.

A party may be relieved from the consequences of a stipulation when that stipulation was entered into by fraud, collusion, mistake or accident (*Hallock v. State*, 64 NY2d 224, 230 [1984]). A cause of action for fraud requires that the complaining party justifiably relied upon the fraudulent

statement (*Lama Holding Co. v. Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]). A false representation may not be relied upon "if the means of obtaining the truth are available by the exercise of ordinary intelligence" (*Matter of Jack Kent Cooke, Inc. (Saatchi & Saatchi N. Am.)*, 222 AD2d 334, 334 [1<sup>st</sup> Dept., 1995]).

Accordingly, Northside could not have relied on Stelco's statements for the purposes of a fraud claim; and the fraud argument is unpersuasive.

Northside next argues that Stelco frustrated the settlement's purpose by failing to forward certain documents to HPD that would allow HPD to release the funds to Stelco. The doctrine of frustration of purpose is very narrow and applies only where "the frustration is substantial" (*Rockland Development Assocs. v. Richlou Auto Body, Inc.*, 173 AD2d 690, 691 [2<sup>nd</sup> Dept., 1991]). "In order to invoke this defense, the frustrated purpose must be so completely the basis of the contract<sup>2</sup> that, as both parties understood, without it, the transaction would have made little sense" (*Crown It Services, Inc. v. Koval-Olsen*, 11 AD3d 263, 265 [1st Dept., 2004]).

The settlement agreement provides for the payment of money by Northside. It is not contingent on HPD approval or funds; it states that Northside will "use its best efforts" to

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<sup>2</sup> A stipulation of settlement is essentially a contract (*Guzman v. 188-190 HDFC*, 37 AD3d 295, 297 [1st Dept., 2007]).

attempt to obtain payment from HPD. Northside's inability to do so does not frustrate the settlement's purpose.

In reply, Northside adds the arguments that upholding the stipulation would be inequitable, it is ambiguous, and that setting it aside would not prejudice Stelco. These arguments were not raised initially. Accordingly, the court accepts the letter in "sur-reply" which refutes each. In any event, if the agreement was improvident when made the time to seek relief was immediately, or no sooner than the expiration of the period for attempting to obtain funds from HPD. Indeed, by mid-July 2010, Northside was on notice from HPD that payment from the loan balance was uncertain at best (see, Kulikowski Affidavit, Ex. P and W). By waiting until a formal pre-judgment demand was made, Northside upsets the certainty that settlement of litigation is intended to provide.

Stelco's requests for attorneys' fees or sanctions constitute overreaching.

In light of the foregoing, it hereby is ORDERED that the motion to vacate the settlement stipulation is denied; and it further is

ORDERED that the TRO expires upon entry hereof.

Dated: 6/28/11, 2011

**FILED**

JUN 30 2011

NEW YORK COUNTY CLERK'S OFFICE

Enter:

*[Signature]*  
\_\_\_\_\_  
J.S.C.  
**JAMES S. CHAMBERS**