

Romanelli v Disilvio

2011 NY Slip Op 32103(U)

June 30, 2011

Supreme Court, Nassau County

Docket Number: 8083/08

Judge: Winslow

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SUAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

SALVATORE ROMANELLI,

TRIAL/IAS, PART 4
NASSAU COUNTY

Plaintiff,

-against-

MOTION SEQ. NO.: 002, 004,
005, 006

MOTION DATE: 3/16/11

MARIA DISILVIO and ANTONIETTE CICCHIELLO

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Defendants.

The following papers having been read on the motion (numbered 1-7):

Notice of Motion Seq. No. 002.....1
Affidavit in Opposition.....2
Reply Affirmation.....3
Notice of Cross Motion to Amend Complaint Seq. No. 004.....4
Notice of Cross Motion Seq. No. 005.....5
Notice of Cross Motion Seq. No. 006.....6
Affirmation in Opposition7
Memorandum of Law.....7a

Motion (seq. no. 2) by the attorneys for the defendants for an order pursuant to CPLR 3212 granting defendants summary judgment dismissing the complaint is determined as follows. Cross-motion (seq. no. 4) by the plaintiff for leave to serve an Amended Complaint; cross-motion (seq. no. 5) by the attorneys for the defendants for an order pursuant to 22 NYCRR Part 130-1.1 for sanctions and costs against the plaintiff; and cross-motion (seq. no. 6) by the plaintiff for an order pursuant to CPLR 5015 vacating the decision and judgment of this Court dated September 16, 2008 are determined as follows.

The parties formed a partnership known as Tri-Equity Partners. The partnership acquired title to the premises known as 82, 88 and 90 Horton Avenue, Lynbrook, New York (the subject property). Disagreements arose between the parties. Litigation ensued. The dispute was resolved by a Stipulation of Settlement So Ordered by Hon. Thomas A. Adams, J.S.C. on July 31, 1997.

The Stipulation of Settlement provided as follows:

Mr. Schlesinger: On or before September 1, the defendant Salvatore Romanelli will convey to the plaintiffs all of his right, title and interest in the New York properties, and all improvements thereon, and will execute all documents reasonably necessary to effectuate this transfer. Any tax certiorari proceeds on the account of the New York properties as, of and when they're realized, net of any costs in obtaining those tax certiorari proceeds shall be split two-thirds/one-third: two-thirds to the plaintiffs, one-third to the defendants.

The defendants shall reside in the property, have the right to reside in the property, until June 30, 1998.

The plaintiffs will pay to the defendants ten thousand dollars upon the delivery of the deeds to the New York properties and fifteen thousand dollars upon their vacating the New York properties . . .

The complaint alleges that the defendants violated the Stipulation by "failing to prosecute tax certiorari proceedings, thereby depriving plaintiff of his right to one-third of the proceeds of all such tax certiorari recoveries . . . and failing to pay \$15,000 to plaintiff when plaintiff vacated" the subject premises. (¶ 16). Plaintiff also alleges that the defendants "fraudulently induced" him to enter into the Stipulation of Settlement to his "detriment." (¶ 37).

By Order dated September 16, 2008, this Court determined that the plaintiff was not entitled to the \$15,000 since he failed to vacate the premises in a timely manner as provided for in the Stipulation. This Court also determined that the plaintiff was entitled to one-third of the net proceeds from tax certiorari proceedings for the tax periods during which he was owner of the realty, not after he relinquished all right, title and interest in the subject property pursuant to the Stipulation of Settlement on September 1, 1997.

In this Court's September 16, 2008 Order, plaintiff's fourth cause of action alleging "fraudulent inducement" was dismissed.

[* 3]

In its prior decision, this Court found that the plaintiff received a check for one-third of the net proceeds from tax proceedings commenced during the tax years in which he had an ownership interest in the property. Defendants provided a breakdown calculation of plaintiff's share of the proceeds.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557.

In opposition to the motion for summary judgment, the plaintiff submits a copy of a voucher from the Village of Lynbrook purportedly representing a tax refund in the sum of \$95,000 for the subject property for the tax periods 2001/02-2007/08. Assuming *arguendo*, defendants did receive the proceeds from the settlement, the plaintiff would not be entitled to any share since it includes monies for tax years that this Court has already determined are not covered by the Stipulation of Settlement. The plaintiff also brought a motion to serve an Amended Complaint and another for relief pursuant to CPLR 5015. Plaintiff argues that defendants failed to apprise this Court that the tax certiorari action they were prosecuting as attorneys of record was, in fact, proceeding against the Village at the time of their motion to dismiss in 2008 and this "would probably have produced a different result." (Affidavit in Support of Motion for Relief from Judgment). Again, the record establishes that any refund from the Village did not cover the period when the plaintiff was in title.

Finally, plaintiff withdraws any claims for the \$15,000 that he was not paid since he did not vacate the subject premises in a timely manner.

The plaintiff seemingly believes that he never agreed to accept tax certiorari proceeds only for the period when he was the owner of the premises. Plaintiff's position is vacuous. There is absolutely no reason based on the facts and the law to conclude that the plaintiff is entitled to tax certiorari proceeds after he was no longer in title.

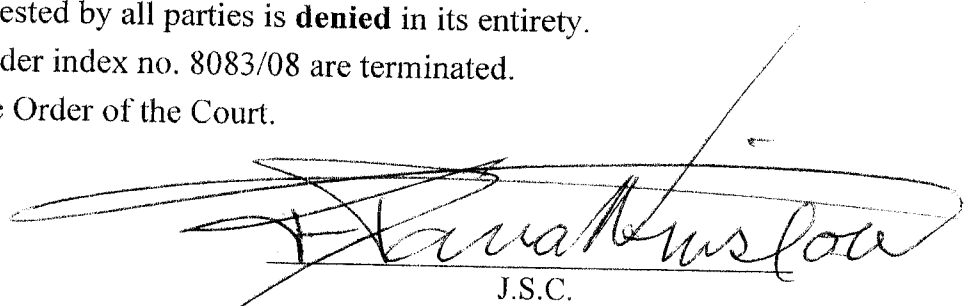
The dispute between and amongst these parties is protracted and personal in nature. The plaintiff's motion for leave to amend the complaint and to vacate this Court's prior order and defendants' motion for sanctions are examples. The plaintiff, listens to only his own counsel and has constructed a proposed amended complaint that is clearly deficient. He wants the clock to be turned back to 1995 and for the Court to grant him "a redo," for which there is no basis in law or fact. Defendants feel that "enough is enough" and the only way to prevent further litigation of the issues is for this Court to impose sanctions. This Court does not consider the plaintiff's conduct to be so egregious as to warrant the imposition of sanctions at this time, especially in today's culture of open access to the doors of the courthouse, where a plaintiff is no longer referred to as being *pro se*, but rather "self represented" and is empowered to pursue his claims without an attorney under the NYS Courts Access to Justice Program. However, any continuation of this course of conduct as demonstrated by plaintiff's present application and as seen in court conferences, will lead to a reconsideration of the courts determination that the request for sanctions be denied. Access to the courts does not mean license, and unfettered access by some means potential denial to others of the right to have their controversies decided in a timely manner.

Defendants' motion for summary judgment dismissing the complaint is **granted**.
The balance of relief requested by all parties is **denied** in its entirety.

All proceedings under index no. 8083/08 are terminated.

This constitutes the Order of the Court.

Dated: June 30, 2011



J.S.C.

ENTERED

JUL 22 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**