

**Farrell v LGS Realty Partners LLC**

2011 NY Slip Op 32274(U)

August 18, 2011

Supreme Court, New York County

Docket Number: 603267/09

Judge: Joan B. Lobis

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

PRESENT: YORK  
Justice

PART 2

RICHARD FARRELL  
- v -  
LOS REALTY PARTNERS

INDEX NO. 603267/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

AUG 22 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/18/11

Luy  
\_\_\_\_\_  
**LOUIS B. YORK** 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):

**FILED**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

**AUG 22 2011**

-----x  
RICHARD FARRELL and  
AYTEN FARRELL,

Plaintiff,

NEW YORK  
COUNTY CLERK'S OFFICE

Index No. 603267/09

-against-

LGS REALTY PARTNERS LLC and  
AHA REALTY PARTNERS,

Defendant.

-----x  
LOUIS B. YORK, J.:

Prior to the period in controversy in this action plaintiffs occupied apartment 2D, a rent-stabilized tenancy in defendants' apartment building on Riverside Drive in Manhattan. The parties litigated matters relating to that apartment in Civil Court several years ago. Around December 3, 2007 they signed a stipulation of settlement of that action. Pursuant to this agreement plaintiffs paid \$2,000 to defendants, abandoned apartment 2D and moved to apartment 2G in the same building. The agreement further stated that within 10 days defendants would recognize plaintiffs as rent stabilized tenants and send plaintiffs a rent-stabilized lease for the new apartment.

Within the requisite 10-day period defendants provided an unsigned copy of the lease in question. The lease indicated that plaintiffs were entitled to a "preferential," or stabilized, rent; and the document further indicated that the lease would expire on January 31, 2009. Plaintiffs signed and returned the renewal lease for apartment 2G and made payments under the terms of that lease. However, defendants returned about \$3000 in rent to plaintiffs and wrote that it would accept future payments from plaintiffs on a month-to-month basis only.<sup>1</sup> Plaintiffs also allege, in

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<sup>1</sup> It is unclear exactly when this occurred. Plaintiffs state that they received the lease in October 2008 but that subsequently, in July 2008, defendants served the Notice of Eviction. It

the course of their current papers in support of their order to show cause, that they've received subsequent nonconforming leases – which, among other problems, did not contain an attorney's fees provision – and that there are habitability issues with respect to their apartment. It also appears that they may have withheld rent at some point or points during their tense negotiations with defendants.

In September 2009 defendants served plaintiffs with a 30-Day Notice of Eviction, asserting that the apartment had become de-stabilized and plaintiffs and defendants wanted to terminate their month-to-month tenancy. In response, plaintiffs commenced this action for breach of contract seeking specific performance of the original stipulation and a declaratory judgment as to plaintiffs rights as rent-stabilized tenants. When the matter came before this Court in February of this year, I issued a preliminary injunction preventing defendants from commencing eviction proceedings against plaintiffs. Shortly thereafter, defendants withdrew their 30-Day Notice and the parties settled the action by way of a stipulation in which, among other things, defendants recognized plaintiffs as rent-stabilized tenants and plaintiffs also preserved their right to recover attorney's fees.

Plaintiffs, exercising their rights under the stipulation, moved for the fees in February 2011. This Court granted the motion and referred the matter to a Special Referee for a hearing on attorney's fees. Before the special referee on May 18, 2011 the parties entered a stipulation of settlement pursuant to which defendants agreed to pay plaintiffs \$18,000.00 no later than May 25, 2011. The stipulation stated that in the event of a failure to pay on that date, plaintiffs would be entitled to a judgment of \$20,000.00 within seven days of nonpayment. In the event of a

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appears that plaintiffs also confuse 2011 and 2010 occurrences – for example, stating that defendants failed to send them an executed copy of the renewal lease in March 2011, and that plaintiffs counsel responded to this failure in April 2010.

default by defendants, plaintiffs were entitled to enter a \$20,000 money judgment, without notice, against defendants. Plaintiffs had seven days to file the judgment.

Defendants failed to pay the \$18,000.00 on May 25, 2011 and did not offer a \$20,000 payment within seven days of their default. On June 1, 2011, plaintiffs entered a judgment in the stipulated amount. In addition, the judgment included \$505.00 in costs. At a conference between the parties on July 7, 2011, plaintiffs offered to settle if defendants made a full payment of \$20,000.00 by noon the following day or of \$25,000 on Monday, July 11. Defendants counter-offered that they would pay \$20,000 rather than \$25,000 on July 11, as they could not get together either amount in the course of a single business day. Plaintiffs rejected this offer by email, citing the additional costs defendants' delays had caused them. Nonetheless on July 11, defendants sent plaintiffs copies of two checks – one for \$18,000 and the other for \$2,000.<sup>2</sup> Plaintiffs refused defendants' tender of payment of the settlement amount and brought this motion by order to show cause.

In their order to show cause, plaintiffs make three requests in connection with the stipulation. First, plaintiffs seek leave to file a proposed supporting memorandum of law not to exceed forty pages. Second, plaintiffs request an extension of the preliminary injunction to enjoin defendants from pursuing eviction proceedings against plaintiffs until defendants pay the outstanding attorney's fees. Third, plaintiffs ask that the Court vacate the May 18, 2011 stipulation pursuant to CPLR § 5015(a)(3). Plaintiffs argue that, based on a general assertion of promissory fraud and fraud in the inducement, an evidentiary hearing is necessary on the amount of reasonable RPL § 234 attorney's fees to be awarded to plaintiffs. Defendants challenge the

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<sup>2</sup> Apparently inadvertently, defendants annex two copies of the \$18,000 check and no copies of the \$2,000 check as evidentiary support.

allegations of fraud and, without cross-motion, seek an order compelling plaintiffs to accept their \$20,000 payment. For the reasons below, the Court denies plaintiff's order to show cause in its entirety. In addition, the Court does not consider the request to compel plaintiffs to accept the settlement offer, as defendants have not requested this affirmative relief by way of cross-motion.

The Court denies plaintiffs' request for permission to file a proposed supporting memorandum of law not to exceed 40 pages. The Court notes that the rules for the IAS Parts rather than the rules of the Commercial Division govern here, but those rules allow for briefs of only 30 pages. Moreover, it is not the practice of this Court to allow additional pages without a showing of good cause. In support of their request, plaintiffs fail to provide any explanation whatsoever as to the need for the additional pages – and, in fact, they've simultaneously provided a conforming brief, showing that it is possible for them to comply with the IAS guidelines. Accordingly, the Court denies the application and relies instead on plaintiffs' original, compliant memorandum.

Plaintiffs also request that the Court vacate the May 18 stipulation of settlement. Courts favor stipulations of settlement and do not cast them aside lightly, especially in the case of open court stipulations such as the one here. *See Hallock v. State*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512 (1984). Absent a showing of "fraud, misrepresentation, or other misconduct of an adverse party," a party to a stipulation may not avoid the consequences of the agreement. CPLR § 5015(a)(3); *see Hallock*, 64 N.Y.2d at 230, 485 N.Y.S.2d at 512.

Here, plaintiffs allege promissory fraud and fraud in the inducement as grounds for vacating the stipulation of settlement entered in court before the Special Referee on May 18, 2011. Plaintiffs claim that defendants never intended to perform pursuant to the stipulation and that defendants' alleged misrepresentation induced plaintiffs' reliance. As the parties alleging

fraud, plaintiffs bear the burden of producing clear and convincing evidence that shows each element of fraud. *See Muller v. New York State Div. of Hous. & Community Renewal*, 263 A.D.2d 296, 308, 703 N.Y.S.2d 80, 89 (1st Dept. 2000). In particular, they must prove a representation of material fact, the falsity of that representation, knowledge of its falsity by the party who made the representation, justifiable reliance on the representation by the party to whom it was made, and resulting injury. *See Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 2011 WL 2183293, at \*5 (Ct. App. June 7, 2011); *Nicosia v. Bd. of Mgrs. of the Weber House Condominium*, 77 A.D.3d 455, 456, 909 N.Y.S.2d 412, 414-15 (1st Dept. 2010). The circumstances constituting the fraud must be stated in detail. CPLR 3016(b).

Plaintiffs argue that defendants entered into the May settlement without the intent to perform and therefore are guilty of fraud. In support, plaintiffs allude to their earlier problems with defendants, including the attempt to terminate their rent-stabilized tenancy, as further evidence of defendants' insidious conduct. However, although given the protracted fighting over their tenancy status plaintiffs' frustration is understandable, they nevertheless have not shown that defendants are guilty of fraud in this instance. Instead, plaintiffs' alleged evidentiary support relating to the May 2011 stipulation consists mostly of paraphrased quotes of defendants' words and mere conjecture as to defendants' state of mind when they entered into the arrangement. Their assertions do not identify a false representation upon which a plausible claim of fraud can rest, *see Bushwick Prop. Management Ltd. Partnership v. Woods*, 2004 WL 3243413 at \*1 (conclusory allegations of duress by her counsel insufficient to warrant vacatur), especially as defendants were prepared to pay \$20,000.00 less than two months after the original due date. *See Centro*, 2011 WL 2183293, at \*5. Consequently, plaintiffs cannot establish that they justifiably relied on any false, material statement. Furthermore, plaintiffs cannot show an injury resulting

from the purported fraud because defendants tendered payment and they rejected the offer. Accordingly, plaintiffs fail to establish each necessary element of fraud by clear and convincing evidence. *See Fariello v. Checkmate Holdings, LLC*, 82 A.D.3d 437, 438, 918 N.Y.S.2d 408, 409 (1st Dept. 2011) (general allegations that defendant entered into contract while lacking intent to perform it insufficient to support claim). Accordingly, the Court denies plaintiff's request to vacate the stipulation on the grounds of fraud.

In addition to the grounds established in CPLR § 5015(a), a court may vacate its own judgment "for sufficient reason and in the interests of substantial justice." *Woodon v. Mendon Leasing*, 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 731 (2003). Alternatively, plaintiffs ask that the Court exercise its discretion and vacate the judgment. However, by showing that they offered payment on July 11, defendants demonstrated they intended to abide by the stipulation; and, plaintiffs did not show that they were prejudiced by defendants' failure to tender payment by the original dates of May 25 or June 1, 2011. Moreover, and significantly, the stipulation itself provides for a remedy in the event of default – that is, the entry of judgment – and plaintiffs have availed themselves of that remedy. Therefore, vacating the May 18, 2011 stipulation – and, along with it, the judgment – would not be in the interest of substantial justice and the Court denies plaintiffs' request on this ground as well. *Cf. 401 Commercial L.P. v. Jog, LLC*, 2008 WL 383810, at \*4-5 (late payment under stipulation of settlement, where inadvertent and corrected within a month, did not constitute good cause under RPAPL §749(3) for court to vacate stipulation and allow eviction of respondent from premises).

For the reasons above, the Court denies plaintiffs' request to vacate the stipulation on the grounds of fraud or in the interest of substantial justice. Instead, the Court finds that plaintiffs' \$20,000 judgment should be enforced. This provides full relief under the stipulation. The Court

finds defendants' complaints about the inclusion of \$505.00 in costs unpersuasive. The costs were incurred in the course of entering judgment and would have been avoided had defendants paid the amount due under the stipulation in a timely fashion. Moreover, they do not strike the Court as overstated, much less exorbitant.

Finally, plaintiffs ask in their order to show cause that the Court continue the preliminary injunction to enjoin defendants from commencing any eviction proceeding against the plaintiffs until further order of the Court. Because the Court does not vacate the stipulation of settlement, which presumes the existence of a valid tenancy, and also allows the \$20,000 judgment to stand, no injunction is necessary. Accordingly, plaintiff's application for an extension of the preliminary injunction is denied.

Based on the above, therefore it is

ORDERED that the request to vacate the stipulation is denied and the stipulation remains in effect.

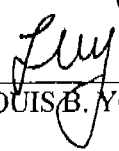
Dated: 8/18/11

**FILED**

AUG 22 2011

ENTER:

NEW YORK  
COUNTY CLERK'S OFFICE

  
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LOUIS B. YORK, J.S.C.