Behar v Quaker Ridge Golf Club, Inc.
2011 NY Slip Op 34312(U)
January 24, 2011
Supreme Court, Westchester County
Docket Number: 11594/2010
Judge: J. Emmett Murphy
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED and ENTERED

On January 25, 2011
WESTCHESTER COUNTY CLERK

P R E S E N T: HON. J. EMMETT MURPHY,
SUPREME COURT JUSTICE

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LEON BEHAR and GAIL BEHAR,

Plaintiffs,

- against -

QUAKER RIDGE GOLF CLUB, INC.,

Defendant.

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FILED
JAN 25 2011
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SHORT FORM ORDER
Index No.: 11594/2010
Motion Date: May 12, 2010

The following papers numbered 1 to 42 have been read on this motion by plaintiffs Leon and Gail Behar seeking a determination that defendant Quaker Ridge Golf Club, Inc. violated the terms of the stipulation of settlement entered into in open Court on June 9, 2010 and upon defendant Quaker Ridge Golf Club, Inc.'s motion to vacate the same stipulation of settlement.

Papers	**Numbers**
Order to Show Cause/Affidavits/Affirmation;	1 - 5
Exhibits;	6 - 24
Answering Affidavit;	25
Exhibits;	26 - 27
Replying Affirmation;	42
Affidavit in Support of Oral Motion to Vacate;	28
Memorandum of Law;	40
Exhibits;	29 - 39
Memorandum of Law;	41

Upon the foregoing papers, and upon oral argument held with respect to these and other pending applications by the parties on related issues, it is ORDERED that these motions are consolidated for the purposes of this decision; and it is further ORDERED that, for the reasons that follow, plaintiffs' motion seeking a determination that defendant violated the stipulation of settlement and directing defendant to reimburse plaintiffs for the costs associated with a golf ball trajectory study is denied; and it is further ORDERED that the defendant's motion to vacate the stipulation of settlement is granted.

Plaintiffs Leon and Gail Behar have brought this action alleging nuisance, trespass and negligence related to the incursion of golf balls onto their property which abuts defendant's golf course. The stipulation of settlement that was ultimately reached by the parties on June 9, 2010, after much negotiation, memorialized primarily a commitment on defendant's part to its prompt application to the Village of Scarsdale Planning Board for approval to place a 60 foot safety net situated to protect plaintiffs from the incursion of errant golf balls.[1] The stipulation of settlement also required that plaintiffs support the defendant's application and fully cooperate with the process necessary to obtain it. Shortly thereafter, defendants applied for the 60 foot safety net, and at a public meeting of the Planning Board, counsel for the Club advocated for approval of a 60 foot safety net. The Scarsdale Manor Homeowners' Association (Homeowners' Association), comprised of other residents of the small planned community where plaintiffs' home is located, voiced their adamant, articulate and concerted opposition to a safety net which they called "enormous, offensive and unacceptable." At the conclusion of the public meeting, the Planning Board adjourned the defendant's application pending receipt of alternative barriers to the proposed 60 foot net and "an analysis, based on scientific evidence, regarding the golf balls' likely trajectories . . ." The Planning Board also directed the defendant to continue discussions with the Homeowners' Association. (It should be noted here that plaintiffs had previously applied for permission to erect a 40 foot net, that it was rejected and that the Planning Board's decision is on appeal.)

On October 6, 2010, at an appearance before this Court, the parties discussed the stipulation of settlement in light of the developments in the months since the application process began and the neighbors first expressed their opposition to a 60 foot net. It had become apparent that the Planning Board would not grant an application for a 60 foot net under those circumstances. The Court concluded that there was no "legitimate purpose to be served in going though the motions of making the application, spending money for it." Since that time and during the pendency of these motions, the defendant has sought and received approval for a 40 foot net which is now in place along with a number of newly-planted 30-32 foot tall trees. In this application, plaintiffs seek a determination finding defendant in violation of the stipulation of settlement and directing defendant to reimburse them for the costs they incurred in retaining an expert in golf ball trajectories. Defendant opposes the application and moves to vacate the stipulation of settlement.

A stipulation of settlement is a contract, enforceable on its terms (*see MacKenzie v. Vintage Hallmark, PLC*, 302 AD2d 503 [2d Dept., 2003]; *Kraft v. Vassilaros & Sons*, 43 AD2d 972 [2d Dept., 1974]). To that end, the interpretation of an unambiguous contract provision is for the court (*see, Teitelbaum Holdings v. Gold*, 48 NY2d 51 [1979]). Because stipulations of settlement are judicially favored, they are not lightly set aside (*see Hallock v. State of New York*, 64 NY2d 224, 230 [1984]) and are strictly enforced, particularly when made in open court by parties who are represented by counsel and who assent to its terms, and thus a party will not be relieved from the consequences of a stipulation of settlement unless it establishes cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident (*see McCoy v. Feinman*, 99 NY2d 295, 302 [2002]; *Hallock v. State of New York*, 64 NY2d 224 [1984]; *Quality Ceramic Tile & Marble Co., Ltd. v. Cherry Valley, Ltd.*, 259 AD2d 607 [2d Dept., 1999]; *HCE Assocs. v. 3000 Watermill Lane Realty Corp.*, 131 AD2d 543, 545 [2d Dept., 1987]). Stipulations may also be deemed unenforceable when they are "unreasonable," "against good morals" or

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[1]The 60 foot number was suggested by the Court, as plaintiffs had previously sought a 40 foot net and were, at that point, suggesting a 120 foot net.

"against sound public policy" (*see Matter of New York, Lackawanna & Western R.R. Co.*, 98 NY 447, 453 [1885]; *Kraker v. Roll*, 100 AD2d 424, 436 [2d Dept., 1984]; *Nishman v. De Marco*, 76 A.D.2d 360, 368 [2d Dept., 1980]).

Here, the stipulation required that the defendant "shall make prompt application to the Planning Board of the Village of Scarsdale for approval of a 60 foot net." Plaintiffs agreed to "support the application and fully cooperate therewith. However, there shall be no necessity for any monetary contribution on their part in connection with such cooperation." There is no basis for viewing this language as ambiguous nor is there persuasive support for plaintiffs' contention that defendant violated that aspect of the stipulation of settlement related to its application to the Village of Scarsdale Planning Board. Within two weeks of the stipulation of settlement, the defendant advocated at length in support of its application for a 60 foot safety net at a public meeting of the Planning Board held on June 23, 2010. While the parties may disagree as to what prompted the apparently heated and vocal opposition to the application which was expressed by the Homeowners' Association at this open meeting, there is no basis on this record to conclude that the defendant undercut its application by not inviting plaintiffs to the Planning Board's public meeting (of which plaintiffs concede having been aware in advance) or, for that matter, to the preceding neighbors' meeting defendant had with other Brittany Close residents (of which plaintiffs were also aware in advance). Plaintiffs agreed in the stipulation of settlement to support the application and to cooperate with the process, but there was no reciprocal obligation in the stipulation of settlement that required defendant to invite or encourage plaintiffs' unfettered participation in the application process. Indeed, as plaintiffs acknowledge, there was an assumption on their part during this time period that since their application for a 40 foot net had already been rejected and there was a pending Article 78 petition, their involvement in the defendant's application might hinder the chances of its approval and so, they cannot credibly argue that the defendant's failure to include them is evidence of the defendant's sabotage.

Nor, for that matter, is the vehement opposition of the neighbors and Homeowners' Association attributable on this record to an effort on the defendant's part to thwart its own application. While the Homeowners' Association did, by letter to the Court, ascribe to the defendant the motivation in seeking approval to erect a 60 foot net to "a fear of a further injunction prohibiting use of the 2nd hole, than by a belief in the screen they are proposing,"even if true, is entirely irrelevant since the stipulation of settlement requires only defendant's timely and good faith action, which has been demonstrated. Neither does this letter demonstrate, as plaintiffs would argue, that the members of the Homeowners' Association were "poisoned" against the application for a 60 foot net since the reasons for their opposition were entirely within the realm of typical neighbor concerns. Indeed, the Homeowners' Association requested respect not only for the cohesive aesthetics of their planned community, but also for compliance with the spirt of the restrictive covenants that bound all of the Brittany Close neighbors. If plaintiffs were denied approval to erect a 40 foot net on the portion of their property which borders the golf course, it follows that there might be reasonable opposition to the defendant erecting a 60 foot net on the portion of the golf course that borders the plaintiffs' property.

The terms of the stipulation of settlement do not, as plaintiffs would argue, obligate the defendant to retain or pay for an expert. The Planning Board did not direct that a particular sort of study be conducted, much less a golf ball trajectory study. Rather, it requested "an analysis, based on scientific evidence." For the purposes of determining the defendant's compliance with the stipulation of settlement, the ball count, which was conducted by the Club specifically to determine the actual number of ball incursions onto plaintiffs' property over a stated period of time and was referenced by the

defendant during the application process, is, at minimum sufficient to demonstrate defendant's willingness to continue in its efforts to seek Planning Board approval for the 60 foot net. The net and its supports would be approximately 20 feet taller than the highest structure on the street.

While it appears from the correspondence between the parties subsequent to the Planning Board's June 23rd meeting that the parties did discuss and attempt to reach an agreement as to the retention of Tanner Consulting Group (TCG), no agreement was reached. In fact, it appears from the submissions of the parties that it was during this part of the application process that the parties' willingness to cooperate with each other towards the mutual goal of a 60 foot net dissipated to the point of exhaustion. When the plaintiffs would not agree to permit TCG's work product to remain privileged from discovery and use at trial, the defendant refused to further consider retaining the expert suggested by the plaintiffs. Since the defendant refused to agree to pay for the expert chosen by the plaintiffs, the plaintiffs flatly refused to attend the neighbors' meeting, arranged by the defendant with the expressed purpose of attempting to procure their consent to the construction of a 60 foot net. Since the Planning Board was obviously reluctant to permit the Club to construct a 60 foot net when the neighbors were so vocally and adamantly opposed to it, denial of the defendant's application became a virtual certainty. To vacate the stipulation of settlement is, under these circumstances, to acknowledge that futility. Accordingly, the Court determines that, on this record, defendant complied with the terms of the stipulation of settlement but that circumstances occurring during the application process rendered defendant's efforts at procuring approval for a 60 foot net essentially futile. Inasmuch as the circumstances have substantially changed since the stipulation of settlement was entered some six months ago, equity requires that the Court grant the defendant's motion to vacate the stipulation of settlement.

Plaintiffs' application to direct defendant to reimburse plaintiffs for the costs associated with retaining TCG is denied. Defendant was not obligated by the stipulation of settlement or by a directive from the Planning Board to retain TCG or any expert and it is of no moment that the defendant initially consulted with TCG and elected not to retain it.

Dated: White Plains, New York
January 24, 2011

HON. J. EMMETT MURPHY,
J.S.C.

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