

Matter of Town of Nassau v Nalley
2012 NY Slip Op 32716(U)
October 10, 2012
Supreme Court, Rensselaer County
Docket Number: 208220
Judge: George B. Ceresia Jr
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

In the Matter of the Application of

TOWN OF NASSAU, NEW YORK,

Plaintiff,

-against-

STEPHEN O. NALLEY d/b/a IMPACT AUTO,

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-0290-03 Index No. 208220

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(Peter A. Lynch, Esq., of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

For a number of years the defendant Stephen O. Nalley operated a junk yard on property located on U.S. Route 20, Town of Nassau in Rensselaer County. During this time

the Town of Nassau has attempted to enforce violations of the Town of Nassau Local Law No. 1 [1989] with regard to the licensing and regulation of defendant's junk yard. In August 2002 the Town commenced an action against the defendant in an attempt to enforce the Local Law. That action was ultimately resolved when the parties entered into a written stipulation of discontinuance which was so-ordered by the undersigned on September 9, 2002. In May 2003 the Town of Nassau commenced the above-captioned action against the defendant by reason of alleged violations of the September 9, 2002 stipulation. The action was resolved through a settlement stipulation placed on the record in open court on September 13, 2004, together with a written stipulation signed by the parties on the same date, which was so-ordered by the Court on November 8, 2004 (hereinafter, the "2004 Stipulation"). That agreement, reached after much litigation and negotiation, memorialized a number of commitments on the part of the defendant regarding the manner in which he would operate and maintain the junk yard. Subsequently, in June 2006, the plaintiff commenced a proceeding seeking to enforce the 2004 Stipulation. Specifically, plaintiff sought an order permanently enjoining operation of the junk yard. On June 8, 2007 the Court, after a hearing, issued an order which granted a permanent injunction prohibiting the defendant from further operation of the junk yard and awarded the plaintiff liquidated damages¹. In its decision and order, the Court found that the defendant violated the 2004 Stipulation in the following manner: in failing to erect and maintain a twelve foot high perimeter fence; in using junk vehicles as "gates" for the fence; in failing to remove motor

¹The judgment was modified on appeal by reducing the award of liquidated damages, but was otherwise affirmed (see Town of Nassau v Nalley, 52 AD3d 1013 [3d Dept., 2008], mot for lv to app dismissed 11 NY3d 771 [2008]).

vehicles from outside the perimeter fence; and in failing to remedy such violations within 48 hours of receiving notice thereof from the plaintiff. After issuance of the decision of the Appellate Division (see footnote one, supra) the defendant, on June 26, 2008, entered into a contract with a salvaging company named JB Car Services, Inc. (“JB Car Services”) to clean up the property. Under the contract, JB Car Services was to remove all cars, trucks, trailers, tires, equipment and miscellaneous metals by October 1, 2008. On October 3, 2008 plaintiff commenced a proceeding to hold the defendant in contempt of court by reason of defendant’s failure to clean up the site (“first contempt proceeding”). In an order dated September 3, 2009 the Court denied the contempt application, but directed the defendant to complete removal of all vehicles, trailers, tires, scrap metal and other debris from the subject real property on or before December 1, 2009. Upon the defendant’s failure to meet the court-ordered deadline, the plaintiff, by notice of motion dated February 9, 2010, made an application to hold the defendant in contempt (second contempt proceeding). The grounds for the application were defendant’s failure to comply with the December 1, 2009 deadline imposed by the Court in its order dated September 3, 2009. The defendant submitted opposition to the application and, in addition, made a motion to vacate all previous orders issued in this matter. In a decision-order dated May 17, 2010, the Court denied the defendant’s motion to vacate all previous orders, and found the defendant to be in contempt of court by reason of his failure to comply with the Court’s orders dated June 8, 2007 and September 3, 2009. In its decision-order dated May 17, 2010 the Court directed that there be a hearing with regard to plaintiff’s actual loss or injury within the meaning of Judiciary Law § 773. The hearing was held on July 15, 2010. In a decision-order dated January 13,

2011 the Court imposed a fine of \$2,492.50 against Stephen O. Nalley.

During the pendency of the second contempt proceeding, a new issue came to light, namely, that in December of 2008 Stephen O. Nalley had deeded a portion of the junk yard property to Barbara A. Secor, the mother of Stephen O. Nalley's son, Stephen B. Nalley. Stephen O. Nalley argued that he had no further obligation with regard to clean-up of the property, and that Barbara A. Secor was actively preventing him from entering upon the property to do so. The Court, in its decision-order dated January 13, 2011 found Stephen O. Nalley's argument to be without merit. Of great significance here, the Court made the following comment:

“Lastly, the Court observes that Barbara Secor and Stephen B. Nalley are not subject to any pre-existing court orders, and are not currently subject to the jurisdiction of the Court. The Court is unaware of any Code enforcement proceedings which have been brought against them by the plaintiff. In a similar vein, it does not appear that the defendant has undertaken any legal action against them to gain access to the Secor Parcel to remove his personal property. Limited relief can be granted under such circumstances. Phrased differently, complete relief may not be capable of being granted in future proceedings unless all parties have properly been brought before the Court.”
(footnote omitted).

The plaintiff, by order to show cause dated January 12, 2012, has made a motion to join Barbara A. Secor and Stephen B. Nalley to the instant action. Defendants oppose the motion on multiple grounds, including that no action is currently pending.

The Court has reviewed both the September 13, 2004 stipulation placed on the record in open court, and the written stipulation dated September 13, 2004 so-ordered on November 8, 2004. Both repeatedly mention that the agreement constitutes a full and final settlement of all claims. The oral stipulation recites “that both parties are dropping all

pending claims against each other with prejudice”. At the conclusion of the oral stipulation, the Court marked the case “settled and the issues are resolved”. The instant case is very similar to DiBella v Martz (58 AD3d 935 [3d Dept., 2009]) where the parties stipulated to dismiss all claims in the pending action with prejudice. The Court found that the parties had effectively discontinued the action, and that therefore the parties would need to commence a new action for further relief.

It is well settled that where a stipulation fully resolves the underlying action, that the action is deemed discontinued (see DiBella v Martz, 58 AD3d 935 [3d Dept., 2009]). Just this year, in VonRitter v VonRitter (91 AD3d 1216 [3d Dept., 2012]), the Court made clear that a motion must be made in a pending action. In this instance, the action was discontinued on September 13, 2004 (see DiBella v Martz, *supra*). Since that time there was an enforcement proceeding specifically authorized by the stipulation, followed by two discrete applications to hold the defendant in contempt of court. Currently, there is no action pending to which Stephen B. Nalley or Barbara A. Secor could be joined. Apart from the foregoing, and as the Court has previously noted, neither Stephen B. Nalley, nor Barbara A. Secor were parties to the 2004 Stipulation.²

The Court is mindful that the plaintiff relies heavily upon CPLR 1018, which recites as follows: “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action” (see CPLR 1018). This provision, however, presupposes that an action is currently pending. As noted, the Court finds that this is not the case.

²Whether or not said stipulation is enforceable against such parties, need not, and is not being determined in the instant decision.

The Court has reviewed and considered the remaining arguments and contentions of the parties and finds, in view of the foregoing, that they need not be addressed.

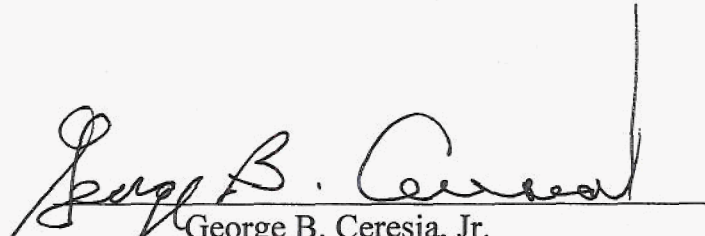
The Court concludes that the motion must be denied.

Accordingly, it is

ORDERED, that plaintiff's motion to join Barbara A. Secor and Stephen B. Nalley as defendants be and hereby is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to Galvin and Morgan, the attorneys for Barbara A. Secor and Stephen B. Nalley. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: October 10, 2012
 Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause date January 10, 2012, Supporting Papers and Exhibits
2. Affidavit of Stephen O. Nalley, sworn to February 14, 2012, Supporting Papers and Exhibits
3. Reply Affirmation of Bruce S. Huttner, Esq., dated February 15, 2012
4. Affidavit of James E. Morgan, Esq., sworn to April, 2012 and Exhibits
5. Affidavit of Stephen B. Nalley, sworn to April 12, 2012 and Exhibits
6. Affidavit of Barbara Secor, sworn to April 12, 2012 and Exhibits
7. Affidavit of Bruce S. Huttner, Esq., sworn to May 11, 2012, and Exhibits