| **Clark v McGlynn** |
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| 2013 NY Slip Op 34239(U) |
| January 22, 2013 |
| Supreme Court, New York County |
| Docket Number: 110328/2009 |
| Judge: Doris Ling-Cohan |
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

ANDREA W. CLARK,

Plaintiff,

-against-

BRENDAN P. MCGLYNN,

Defendant.

INDEX NO. 110328/2009
MOTION DATE
MOTION SEQ. 003
MOTION CAL.NO.

RECEIVED
JAN 23 2013
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 - 8 were considered on this motion to, *inter alia,* compel compliance with the parties' prior stipulations :

| Papers | Numbered |
|---|---|
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits | 1, 2 |
| Answering Affidavits - Exhibits (Memo) | 3, 4 |
| Replying Affidavits (Reply Memo) | 5 |
| Interim Order dated July 13, 2012 | 6 |
| Supplemental Submissions | 7, 8 |

FILED
JAN 24 2013
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [ ] Yes [X] No

Upon the above submitted papers, plaintiff's motion for an order: (1) pursuant to CPLR §2014, compelling defendant to comply with the terms of the "So Ordered" stipulations dated July 7, 2010 and September 17, 2010; (2) for the appointment of a receiver pursuant to CPLR §6401, to oversee and conduct the sale of a cooperative apartment co-owned by the parties (the "apartment"); and (3) pursuant to 22 NYCRR §130-1.1, imposing costs, including without limitation, reasonable attorney's fees and the imposition of sanctions, based upon defendant's frivolous conduct is granted as detailed below.

This action was commenced, on or about July 2009, over three (3) years ago, pursuant to RPAPL §901, for partition and a forced sale of the subject apartment, co-owned by the parties, who were formerly in a romantic relationship. It is not disputed that defendant has had the exclusive use and control of the subject apartment, which the parties co-own, since November 2008, where he continues to reside. While the parties have appeared before this court numerous times during the over three (3) years since this case was commenced, and attempts have been made to resolve this matter between

the parties, amicably, the case continues, with no resolution.

After conference on July 7, 2010, over two (2) years ago, the parties agreed by "So Ordered" stipulation, to the following:

> "[d]efendant [would] "have until Aug[ust] 7, 2010 to obtain a loan commitment letter sufficient to satisfy the existing loan and remove plaintiff as an owner. If defendant does not receive a loan commitment letter by Aug[ust] 7, 2010 then the parties will list the [apartment] for sale with a licensed professional real estate agent/broker. If defendant receives a loan commitment letter by August 7, 2010, then def[endant] shall have until Sept[ember 15, 2010 to close on said loan ...If def[endant] cannot close on the loan by Sept[ember] 15, 2010, then the parties shall immediately list the apartment for sale with a licensed real estate agent/broker unless the parties agree to an extension of that time frame. Plaintiff shall cooperate as necessary in order to facilitate the closing on the loan. However nothing contained herein shall be read or construed as requiring plaintiff to close on the refinance and transfer of the apartment to the defendant unless and until plaintiff and defendant have agreed upon the compensation and consideration to plaintiff in connection with the transfer of the apartment to def[endant]".

Exh. F, Notice of Motion. The July 2010 stipulation also provided that the parties would return to court on September 17, 2010, for further conference.

On September 17, 2010, the parties appeared before this court and it is undisputed that defendant violated the July 7, 2010 stipulation. Nevertheless, a second "So Ordered" stipulation was entered into by the partes, in which defendant agreed to pay plaintiff's counsel $10,000, without prejudice, on or before September 27, 2010, to be held pending final resolution of this case. The parties further agreed to have a broker list the apartment "for sale as per the July 7, 2010 dated stipulation on October 2, 2010, unless said date is further extended in writing between the parties". Exh. H, Notice of Motion.

Thereafter, defendant violated the September 17, 2010 stipulation. It is not disputed that defendant failed to pay to plaintiff's counsel $10,000, by September 27, 2010, as agreed, and the apartment was not listed with a broker on October 2, 2010. Nevertheless, on or about, February 15, 2011, over four months later, defendant eventually made the $10,000 payment required by the September 17, 2010 stipulation. *Significantly*, however, *it is not disputed that, to date, over two (2) years after the signing*

*of the July 7, 2010 stipulation* (the first stipulation), defendant has not obtained a loan commitment to re-finance the loan on the apartment and the apartment has not been sold.[1]

As stated, plaintiff now moves for an order pursuant to CPLR §2014, compelling defendant to comply with the terms of the "So Ordered" stipulations dated July 7, 2010 and September 17, 2010, for the appointment of a receiver to oversee and conduct a sale of the apartment and for the imposition of costs and sanctions, based upon defendant's frivolous conduct. Plaintiff argues herein that, defendant has been acting in bad faith in not honoring the prior "So Ordered" stipulations. According to plaintiff, defendant's "continuing refusal to re-finance or list the [a]partment for sale even after entering into the July and September Stipulations are all part of a continuing pattern of behavior which results in [p]laintiff being held hostage, damaged and burdened under the continuing onus and liability for an [a]partment of which the [d]efendant has had the sole use and benefit for almost three years". ¶57, Affirmation in Support. Plaintiff further argues that such behavior by defendant, over the course of this action, is frivolous, warranting an award of costs and sanctions, including, reasonable attorneys' fees, pursuant to 22 NYCRR §130-1.1. Plaintiff seeks an appointment of a receiver at this juncture, arguing that based upon the history of this case, and in particular, defendant's conduct, a receiver is necessary to conduct the sale of the apartment. It is noted that the parties both agree that a sale of the apartment should occur.

In opposition, defendant merely conclusory asserts that he has complied with the prior stipulations to the best of his ability. No proof, however, is supplied in support defendant's position that "the banks [he has] dealt with thus far have given [him a] preliminary approval but will not move forward to giving an actual loan commitment until [p]laintiff provides them with adequate assurances that [p]laintiff will cooperate with the refinancing". ¶3, Affidavit in Opposition. Noticeably absent from defendant's opposition papers is any evidence that a completed loan application was ever submitted to a lender. Nor has defendant supplied names of banks, employees, dates of applications or any preliminary approval. Moreover, no details whatsoever have been supplied as to defendant's

[1] The court notes that since the signing of the September 2010 stipulation, various motions were filed, this case was marked "off calendar" for a time period while the parties continued to attempt to resolve this case, several court conferences were held, discovery was completed and a note of issue was filed, on or about September 11, 2011.

conclusory claim that "[p]laintiff and her counsel [have] been steadfast against cooperating". *Id.* In fact, no documents whatsoever have been supplied in support of any attempt to obtain a loas. Additionally, no details are supplied in defendant's opposition papers, as to any real attempts to actually sell the subject apartment (*ie.* proof of open houses held, details as to any offers made, how many times the apartment was shown, an affidavit from a broker detailing his/her efforts *etc.*).

Thus, by interim order of this court dated July 13, 2012, the parties were directed to provide an update as to the status of the sale of the subject apartment. The order specifically provided that:

> "Such update shall be by detailed affidavit, and shall include, *inter alia*, the selling price of the subject apartment, any reductions in the selling price and the dates of such reductions, if any, whether and how often the apartment has been shown to prospective buyers, whether any offers have been made, and any other details which would demonstrate a good faith effort to sell the subject apartment. The court notes that this information is necessary in its determination of plaintiff's request for the appointment of a receiver to conduct the sale of the parties' apartment, which has been delayed for approximately two (2) years. The court notes that contained in defendant's opposition papers is a document which appears to have given New Heights Realty, the exclusive right to sell the subject apartment, from January 21, 2012 to July 21, 2012. Thus, an update is needed.
>
> *Failure to comply with this interim order will be deemed a default/withdrawal on this motion, as appropriate.*

(Emphasis in the original).

Defendant is in default of such July 13, 2012 interim order in that an affidavit has not been supplied. Defendant merely submits an affirmation by his counsel, in which, no details are supplied to demonstrate defendants' alleged good faith efforts to sell the subject apartment, as required by the July 13, 2012 interim order. In particular, there is no indication as to whether and how often the apartment has been shown, whether any offers have been made, any reductions in the selling price and the dates of any such reductions, as specifically required by the order. Defendant merely submits a document titled, "Exclusive Right to Sell", which has allegedly been given by defendant to New Heights Realty, for the period of August 10, 2012 through "February 10, 2012"[2], but has submitted

[2] The February 2012 date appears to be a typographical error.

no proof or acknowledgment that such document was even, if fact, given to New Heights Realty, upon signing, much less acted upon. Significantly, however, a similar document, also titled "Exclusive Right to Sell", was submitted as an exhibit to defendant's opposition papers, which allegedly gave New Heights Realty an exclusive to sell the subject apartment, from January 21, 2012 through July 21, 2012. Noticeably absent from defendant's counsel's affirmation are any details, as to defendant's alleged attempts to sell the apartment during such period from January 21, 2012 through July 21, 2012, when New Heights Realty allegedly also had an exclusive right to sell the apartment. Also noticeably absent is an affidavit from the alleged real estate broker, detailing any attempts at selling the subject apartment. Thus, defendant's mere submission of a more recent "Exclusive Right to Sell", is not evidence that defendant has taken any steps to comply with the prior "so ordered" stipulations, with respect to the sale of the subject apartment.

In plaintiff's response to this court's interim order dated July 13, 2012, plaintiff maintains that the apartment was never listed for sale by defendant and, thus, there is no progress about which to update the court.

Based upon the within submissions, and defendant's undisputed failure to comply with the provisions of the prior court ordered stipulations, signed over two (2) years ago, and defendant's default on this court's interim order dated July 13, 2012, which required the submission of an affidavit detailing defendant's alleged good faith efforts to sell the subject apartment, plaintiff's motion is granted. As to the portion of plaintiff's motion which seeks to compel defendant to comply with the July 7, 2010 and September 17, 2010 stipulations, it is well settled that courts have a strong interest in promoting settlement agreements and in enforcing settlements, especially those made in open court, "where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process". *Hallock v. State of New York*, 64 NY2d 224, 230 (1984); *see also Mitchell v. New York Hosp.*, 61 NY2d 208, 214 (1984); *Mann v. Simpson & Co.*, 286 NY 450, 459 (1941)(courts are bound to stipulations made by parties).

Further, at this juncture, after two (2) years of clear and obvious unexcused delays by defendant, despite being given numerous opportunities to act in good faith to sell the subject apartment as

agreed, the appointment of a temporary receiver, pursuant to CPLR §6401(a), is warranted, to ensure that a sale is actually conducted. *See Martinucci v. Martinucci*, 288 AD2d 444 (2nd Dept 2001)(appointment of a receiver held to be necessary for the sale of certain marital property where the relationship between the parties was acrimonious).

It is significant that both parties agree that a sale of the apartment should occur, since defendant has failed to refinance the loan during the past two (2) plus years. Further, the sale of the apartment has been not been conducted for over two (2) years, without any good faith showing that an effort to sell the apartment has been made. It is noted that defendant's opposition papers offer not a single argument or authority against the granting of the appointment of a receiver, but for defendant's counsel's indication that he believes the appointment of a receiver is "unnecessary". ¶12, Affirmation in Opposition. While in his opposition papers defendant submitted an undated document, titled "Exclusive Right to Sell", from New Heights Realty, allegedly giving New Heights Realty a right to sell the apartment from January 21, 2012 to July 21, 2012, such document, was only obtained by defendant and produced herein, when faced with plaintiff's motion for sanctions and does not excuse defendant's failure to timely comply with the provisions of the parties' prior stipulations, signed over two (2) years ago. Moreover, as stated above, defendant failed to supply this court with any proof or details of his alleged attempts to sell the subject apartment during such time period (January 21, 2012 to July 21, 2012), despite being given an opportunity to do so, by interim order of this court dated July 13, 2012. Nor has defendant provided proof that aside from executing this document, such document was in fact returned to New Heights Realty and not merely executed and kept in defendant's possession. The court notes that defendant has submitted no affidavit from his alleged real estate broker and made no allegations that the sale of the apartment has been delayed by any extenuating factors. Clearly, at this juncture, a temporary receiver is necessary, to assure that a sale is finally conducted.

The imposition of costs and sanctions against defendant pursuant to 22 NYCRR §130-1.1, based upon his conduct is also warranted, as his conduct has been established to be frivolous. Pursuant to 22 NYCRR §130-1.1(a), a court, "in its discretion, may award to any party or attorney in any civil action or proceeding before the court...costs in the form of reimbursement for actual expenses reasonably

incurred and reasonable attorney's fees, resulting from frivolous conduct" and "[i]n addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct...". Conduct is deemed to be frivolous if: "(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". 22 NYCRR 130-1.1( c).

Here, based upon the within submissions and defendant's conduct since the signing of the July 7, 2010 stipulation, as well as the lack of proof supplied by defendant as to any legitimate attempts to obtain financing to close on the loan and/or to sell the subject apartment, in accordance with the parties' prior "so ordered" stipulations, over the past two plus years, and his utter failure to respond by affidavit, to this court's interim order, defendant's conduct was clearly "undertaken primarily to delay or prolong the resolution of [this] litigation", and, thus, is deemed to have been frivolous. Moreover, defendant's conduct in failing to comply with the parties' stipulations was willful, as defendant has asserted no good faith basis for his failure to comply with the parties' stipulations and offers no excuses or extenuating circumstances which may have prevented him from complying with his legal obligations, as agreed to in the parties' prior stipulations. The court notes that even when given an opportunity, by the interim order of this court dated July 13, 2012, to update this court with information as to his attempts to comply with the parties' stipulations, he failed to do so, by affidavit, as required. As such, in accordance with 22 NYCRR 130-1.1(a), the imposition of sanctions, costs and attorney's fees, is appropriate, as detailed below, not to exceed a total of $10,000, in accordance with 22 NYCRR §130-1.2. *See Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons*, 94 AD3d 580 (1st Dept 2012); *In re Grayson v. New York, City Department of Parks and Recreation*, 99 AD3d 418 (1st Dept 2012); *In re Estate of Levine*, 82 AD3d 524 (1st Dept 2011); The costs imposed shall include the attorney's fees incurred by plaintiff with respect to the within motion, as well as the costs incurred with the appointment of the receiver, which is deemed necessary due to the frivolous conduct of defendant.

Based upon the above, it is

ORDERED that plaintiff's motion for an order pursuant to CPLR §2014, compelling defendant to comply with the terms of the "So Ordered" stipulations dated July 7, 2010 and September 17, 2010, for the appointment of a receiver, pursuant to CPLR §6401, to oversee and conduct the sale of a cooperative apartment (the "apartment"), co-owned by the parties and pursuant to 22 NYCRR §130-1.1 imposing costs and sanctions upon defendant for frivolous conduct is granted; it is further

ORDERED that defendant is compelled to comply with the terms of the parties' prior "so ordered" stipulations dated July 7, 2010 and September 17, 2010; it is further

ORDERED that plaintiff shall settle a proposed order, upon notice to defendant, in accordance with 22 NYCRR §202.48, returnable to Room 119A, appointing as a receiver, an individual listed on the Office of Court Administrations Approved Fiduciary List, who is available and willing to accept this appointment, and who shall be authorized to oversee and conduct the sale of the subject apartment and distribute any proceeds of such sale, as appropriate. Such proposed order of appointment shall contain the following language: "The appointed receiver shall, within 30 days of appointment, notify this Court and the parties, by letter, of any conflict or reason why he or she is unable to accept the appointment"; it is further

ORDERED that, as it has been determined that defendant's conduct has been frivolous, the costs associated with the appointment of such receiver and the performance of his/her duties, shall be the obligation of defendant, and shall be deducted from any net proceeds he is entitled to receive from the sale of the subject apartment, or, if the sale does not yield any proceeds to be distributed to defendant or if such proceeds are insufficient to cover the costs of such receiver, a judgment shall be entered against defendant for the amount of the fees determined to be owed to the receiver; it is further

ORDERED that, upon conclusion of the receiver's services and upon presentation of a bill of costs and supporting affidavit from the receiver detailing the receiver's claimed fees, within 20 days, defendant may consent to such costs/fees, or may object by affidavit/affirmation detailing each objection and reason; within 20 days thereafter, if there is a dispute, the parties/receiver shall *confer* to resolve, and if not resolved, within 30 days from conferring to resolve, a motion may be filed with respect thereto; it is further

ORDERED that, as it has been determined that defendant's conduct has been frivolous,

attorneys' fees and costs are awarded to plaintiff, associated with this motion; within 30 days of entry of this decision/order, plaintiff's counsel shall submit to defendant's counsel, an affirmation attesting to his attorneys' fees, his normal hourly rate and years of experience, as well as a bill of costs, associated with the making of the within motion; within 30 days of receipt of such affirmation/bill of costs, defendant is directed to review and if agreed to, pay such fees/costs to plaintiff, or by affirmation, provide specific reasons for his disagreement with such proposed fees/costs (such objections shall be specifically directed to each item billed, with detailed reasons for the objection). Within 30 days thereof, counsel shall meet and confer to resolve the issue of attorneys' fees/costs. If the parties are unable to agree on the amount of the attorneys' fees/costs associated with this motion, within 120 days from entry of this order, either side may file the within order with the Clerk of the Judicial Support Office to arrange a calendar date for a reference to a Special Referee, and such issue is referred to a Special Referee, to hear and determine the amount of such attorneys' fees/costs, in accordance with CPLR CPLR 4317(b)[3]; failure to comply shall be deemed a waiver or default on this claim, as appropriate. and it is further

ORDERED that within 30 days of entry of this decision/order, plaintiff shall serve a copy upon defendant, with notice of entry.

This constitutes the decision and order of the Court.

Dated: 1/22/13

Doris Ling-Cohan, JSC

**Check One: [ ] FINAL DISPOSITION [ ✓ ] NON-FINAL DISPOSITION**

**Check if Appropriate: [ ] DO NOT POST**

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[3] Counsel shall supply a copy of all appropriate submissions related to such issue.