

Hession v Gilmore

2014 NY Slip Op 31932(U)

July 17, 2014

Supreme Court, Suffolk County

Docket Number: 18091/2011

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Karen Hession,

Index No.: 18091/2011

Plaintiff,

Motion Sequence No.: 006; MD

Motion Date: 12/13/13

-against-

Submitted: 4/1/14

Scott Gilmore,

Motion Sequence No.: 007; XMD

Motion Date: 12/13/13

Defendant.

Submitted: 4/1/14

Motion Sequence No.: 008; MOT.D

Motion Date: 3/21/14

Submitted: 4/1/14

Clerk of the Court

Attorney for Plaintiff:

Macri, Greenspan & Moramarco
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Carle Place, NY 11514

Attorney for Defendant:

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Upon the following papers numbered 1 to 85 read upon these motions to enforce a stipulation of settlement, etc., and cross motion for summary judgment on the complaint: Notice of Motion and supporting papers, 1 - 20; 44 - 63; Notice of Cross Motion and supporting papers, 21 - 41; Answering Affidavits and supporting papers, 64 - 69; Replying Affidavits and supporting papers, 70 - 77; 78 - 79; 82 - 85; Other, Memorandum of Law, 42 - 43; 80 - 81; it is

ORDERED that the motions (sequence numbers 006 and 008) by defendant and the cross motion (sequence number 007) by plaintiff are consolidated for purposes of this determination; and it is

ORDERED that the motion (sequence number 008) by defendant for, inter alia, an order enforcing the settlement agreement, executed April 3, 2013, is granted to the extent set forth herein, and is otherwise denied; and it is

ORDERED that the Court, sua sponte, vacates the note of issue filed by plaintiff on November 4, 2013; and it is

ORDERED that the cross motion (sequence number 007) by plaintiff for an order granting summary judgment in her favor on the complaint is denied; and it is

ORDERED that the motion (sequence number 006) by defendant for, inter alia, an order vacating the note of issue and enforcing the settlement agreement executed on April 3, 2013 is denied, as moot; and it is further

ORDERED that the parties and their attorneys shall appear at 9:30 a.m. on **September 3, 2014**, for a conference regarding the retention of a real estate broker and the listing of the subject property for sale.

Plaintiff Karen Hession and defendant Scott Gilmore are the owners of a single-family residence known as 110 Sea Cove Road, Northport, New York, which they purchased in 2006. Involved at that time in a personal relationship, the parties took title to the property as joint tenants and lived together in the home until plaintiff moved out in 2010 when the relationship deteriorated. Defendant remained at the property and continues to live there.

Subsequently, in June 2011, plaintiff commenced this action seeking partition and sale of the property at 110 Sea Cove Road. As an incident to the partition action, the complaint also requests an accounting of the parties' respective expenditures and an award for costs, including attorney's fees. Defendant's amended answer denies the complaint and interposes counterclaims for, among other things, conversion, unjust enrichment, fraud, and an accounting.

Thereafter, the parties entered into a written stipulation of settlement, dated March 29, 2013 and fully executed on April 3, 2013, wherein they agreed the subject property would be listed with a broker and placed on the market for sale. Further, the stipulation provides, in relevant part, that defendant "will use his best efforts to place the property in first class condition for sale and to accommodate and facilitate the broker with respect to the showing of the property"; that defendant, at his own expense, could cause a new deed transferring the parties' ownership interests from joint tenants to tenants in common to be prepared and recorded upon listing the property for sale with a broker; and that, at the time of closing, the parties "shall execute general releases . . . and a

stipulation of discontinuance with respect to the instant action which defendant shall cause to be filed with the court,” as well as a stipulation discontinuing cross claims raised in a mortgage foreclosure action brought against the property by Bank of America. Moreover, it states that, in the event the property is not sold by September 15, 2013, “the parties will determine whether to extend the listing agreement through the broker previously selected by them or select a new broker.” A deed reconveying the property to the parties as tenants in common also was executed by the parties on April 3, 2013.

Shortly after the settlement agreement, on April 11, 2013, the parties entered into an exclusive brokerage agreement with Coach Realtors to offer the property for the sale at a list price of \$759,990. Then, in June 2013, the central air conditioning system for the residence broke, causing damage to ceilings, walls and carpeting, and the parties agreed to submit a claim under their homeowner’s insurance policy. Apparently, the house was not shown by the real estate broker after the air conditioning system broke. Although the repairs were completed in October 2013, the listing agreement expired that same month. To date, no agreement has been reached by the parties to re-list the property for sale. On October 21, 2013, the stipulation of settlement was filed by defendant with the Clerk of the Court. Two days later, on October 23, 2013, a compliance conference was held in this action and, over defendant’s objection, the case was certified as ready for trial. A note of issue and certificate of readiness were filed by plaintiff on November 4, 2013, and a demand for a jury trial was filed by defendant on November 8, 2013.

Defendant now moves for an order vacating the note of issue and “granting judgment in accordance with the terms of the parties’ stipulation of settlement.” In addition, defendant seeks an order directing plaintiff to sign an extension of the listing agreement for the property. Defendant argues, in part, that the stipulation of settlement resolved all issues between the parties, and that it was agreed a stipulation of discontinuance would be filed after the property was sold, so the Court would retain jurisdiction over the matter. He further alleges that plaintiff has refused his request to execute a listing extension agreement with Coach Realtors signed by him in October 2013.

Plaintiff opposes the motion and cross-moves for an order granting summary judgment in her favor on the complaint, directing defendant to account for the money he contributed to maintain the subject property, and dismissing the counterclaims against her. Plaintiff argues the written agreement entered into by the parties in April 2013 was not a stipulation of settlement, but an executory accord enforceable under General Obligations Law § 15-501, that defendant breached his obligations under such accord, and that such breach prevented the property from being sold. She further asserts that defendant’s refusal to agree to list the property at a lower sale price constituted a material breach of the agreement, warranting rescission of such agreement and summary judgment in her favor on the partition action. Alternatively, plaintiff seeks an order striking defendant’s demand for a jury trial on the ground the partition action is equitable in nature, and that, while the counterclaims seek monetary damages, they are incidental to the claim for equitable relief.

Defendant opposes the cross motion and moves again for summary judgment in his favor “in accordance with the terms of the parties’ stipulation of settlement.” He also seeks an order compelling plaintiff to execute an extension of the listing agreement for the sale of the subject property. As in his previous motion, defendant asserts the stipulation of settlement executed in April 2013 resolved all of the claims in this action, and that negotiated language in the stipulation providing for the filing of a stipulation of discontinuance after closing of title was designed to allow enforcement of the stipulation of settlement within this action, rather than by way of a plenary action. He argues that the terms of the stipulation of settlement evince the parties’ intent that the property would remain listed for sale until the transfer of title at closing. Defendant further disputes plaintiff’s allegation that he is in material breach of the stipulation of settlement, and alleges that he has acted in good faith to promote the sale of the property.

Plaintiff’s cross motion is denied. A stipulation of settlement is a contract, enforceable according to its terms against parties “that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court” (*McCoy v Feinman*, 99 NY2d 295, 302, 755 NYS2d 693 [2002]; see *Palmieri v Town of Babylon*, 87 AD3d 625, 928 NYS2d 355 [2d Dept 2011]; *Alshawhati v Zandani*, 82 AD3d 805, 918 NYS2d 173 [2d Dept 2011]). Thus, a settlement agreement is binding if it is made between counsel for the parties in open court, it is reduced to the form of an entered court order, or it is in writing and signed by the parties or their attorneys (CPLR 2104; see *Kleinberg v Ambassador Assoc.*, 64 NY2d 733, 485 NYS2d 748 [1984]; *Wil Can (USA) Group, Inc. v Shen Zhang*, 73 AD3d 1166, 903 NYS2d 429 [2d Dept 2010]). Moreover, stipulations of settlement are favored by the courts and are not lightly set aside (*Hallock v State of New York*, 64 NY2d 224, 230, 485 NYS2d 510 [1984]; see e.g. *Colon v Rite Fold Corp.*, 106 AD3d 862, 967 NYS2d 74 [2d Dept 2013]; *Peralta v All Weather Tire Sales & Serv., Inc.*, 58 AD3d 822, 873 NYS2d 111 [2d Dept 2009]). “Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved of the consequences of a stipulation made during litigation” (*Hallock v State of New York*, 64 NY2d 224, 230, 485 NYS2d 510).

Plaintiff’s submissions are insufficient to establish a prima facie case that she is entitled to summary judgment in her favor on her cause of action for partition. Here, there is no dispute that both parties executed the written document, entitled Stipulation of Settlement, which states “[i]t is hereby stipulated and agreed, by and between the parties to the above-stated action that the same is hereby settled on the following terms and conditions,” and that such document satisfies the requirements of CPLR 2104 (see *Lim v Choices, Inc.*, 60 AD3d 739, 875 NYS2d 192 [2d Dept 2009]). Plaintiff’s argument that the written stipulation executed on April 3, 2013 was an executory accord, rather than a final and binding stipulation of settlement, is rejected. For an accord to exist, there must have been a prior contract or a duty between the parties that has not been satisfied, and a new agreement by the obligor to discharge all or part of the contractual obligation or duty owed (*Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596, 483 NYS2d 979 [1984]; see *Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 604 NYS2d 900 [1993]; *Horn Waterproofing Corp. v Bushwick Iron & Steel Co.*, 66 NY2d 321, 497 NYS2d 310 [1985]; *Post*

v Thomas, 212 NY 264, 106 NE 69 [1914]). There is no indication in the language of the stipulation that the parties entered into the April 2013 stipulation with the intent to discharge a preexisting obligation or duty owed by defendant to plaintiff (see *Merrill Lynch Realty/Carl Burr, Inc. v Skinner*, 63 NY2d 590, 596, 483 NYS2d 979). Moreover, plaintiff failed to demonstrate good cause for invalidating the April 2013 settlement agreement (see *Hallock v State of New York*, 64 NY2d 224, 230, 485 NYS2d 510; *Matter of Sheng v State of N.Y. Div. of Human Rights*, 93 AD3d 851, 941 NYS2d 215 [2d Dept], *lv dismissed* 19 NY3d 955, 950 NYS2d 102 [2012]; *Macaluso v Macaluso*, 62 AD3d 963, 879 NYS2d 571 [2d Dept 2009]).

Accordingly, in view of the determination that the parties entered into an enforceable stipulation on April 3, 2013 settling plaintiff's partition claim and defendant's counterclaims, the Court, sua sponte, vacates the note of issue filed by plaintiff.

The branch of defendant's motion for summary judgment "in accordance with the terms of the parties' stipulation of settlement" is denied. Here, the parties charted their own course and resolved their claims against each other by entering into a contract settling this action (see *Palmieri v Town of Babylon*, 87 AD3d 625, 928 NYS2d 355; see also *Cullen v Naples*, 31 NY2d 818, 339 NYS2d 464 [1972]).

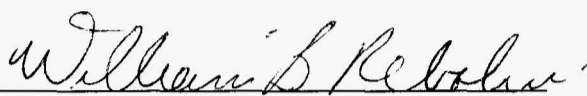
As to the branch of defendant's motion seeking an order compelling plaintiff to execute a listing agreement for the subject property, though a plenary action is necessary to enforce or set aside an express stipulation of settlement or a judgment entered in accordance with the terms of a settlement agreement, the parties may proceed by motion for such relief where, as in this case, the stipulation of settlement does not terminate the lawsuit (see *Teitelbaum Holdings v Gold*, 48 NY2d 51, 421 NYS2d 556 [1979]; *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 131 AD2d 543, 516 NYS2d 269 [2d Dept 1987]). "A settlement agreement entered into by the parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. Absent such termination, the court retains its supervisory power over the action and may lend aid to a party who had moved for enforcement of the settlement" (*Teitelbam Holdings v Gold*, 48 NY2d 51, 53, 421 NYS2d 556). Furthermore, as with any contract, when a court is called upon to enforce a stipulation of settlement, it must construe the language used in the stipulation in accordance with contract principals and effectuate the parties' intent (see *Long Is. Jr. Soccer League v Back of the Net, Ltd.*, 85 AD3d 737, 925 NYS2d 555 [2d Dept 2011]; *Alshawhati v Zandani*, 82 AD3d 805, 918 NYS2d 173; see also *Kraker v Roll*, 100 AD2d 424, 474 NYS2d 527 [2d Dept 1984]).

The stipulation of settlement executed by the parties expressly provides that a stipulation of discontinuance will not be filed in the case until the closing of title, evidencing the parties' intent that such stipulation would not operate as a stipulation of discontinuance. Although defendant has shown he is entitled to seek enforcement of the settlement agreement by motion, his request for an order compelling plaintiff to sign a listing agreement with Coach Realtors is denied, as the stipulation of settlement provides that if the property was not sold by September 15, 2013, the parties would determine whether to extend the first listing agreement or to retain a new real estate broker.

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However, as it is clear from the settlement agreement that the parties intended to jointly decide which realtor would market the subject property, defendant's motion is granted to the extent the parties and their attorneys shall appear for a conference with the undersigned regarding the retention of a real estate broker and the listing of the subject property for sale.

Dated: 7/17/2014


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION