**Rubin v Deckelbaum**

2014 NY Slip Op 32150(U)

August 6, 2014

Supreme Court, Kings County

Docket Number: 500685/11

Judge: David I. Schmidt

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INDEX NO. 500685/2011
NYSCEF DOC. NO. 132
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At an IAS Term, Commercial Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of December, 2013.

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.

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BERNARD RUBIN,
Plaintiff,

- against -

JACOB DECKELBAUM, ESQ.,
a/k/a YAKOV DECKELBAUM, ESQ.,
RELIABLE ABSTRACT CO., L.L.C.,
SHIMMY SPREI,
COMPLETE CONDO MANAGEMENT, INC.,
ABRAHAM LESER, and
JONATHAN RUBIN,
Defendants.

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**DECISION AND ORDER**

Index No. 500685/11

Mot. Seq. No. 7-8

| The following papers numbered 1 to 5 read herein: | Papers Numbered |
| --- | --- |
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2; 4-5 |
| Opposing Affidavits (Affirmations) | 3 |

In this action, inter alia, to recover damages for money had and received, the defendants Jacob Deckelbaum, Esq., also known as Yakov Deckelbaum, Esq., and Reliable Abstract Co., L.L.C. (collectively, the Deckelbaum defendants) move, by order to show cause, dated Oct. 25, 2013, as extended by order, dated Oct. 31, 2013, for an order, pursuant to CPLR 2104 and 3212, enforcing an out-of-court settlement agreement and, thereupon, granting them summary judgment dismissing the amended complaint against all defendants

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upon the payment of $75,000 to the plaintiff Bernard Rubin (the plaintiff) from funds on deposit in an attorney account maintained by Law Offices of David Fleischmann, P.C. (Fleischmann), counsel to the Deckelbaum defendants (seq. No. 8). In the same motion, Fleischmann moves for a protective order, pursuant to CPLR 5240, precluding the plaintiff, his counsel, and the City Marshal from enforcing a levy on Fleischmann's attorney account to partially satisfy a judgment entered in favor of the plaintiff and against the defendant Shimmy Sprei, also known as Sam, Shimi, or Yechiel Shimon Sprei (Sprei). The plaintiff, denying the existence of an enforceable settlement, moves for an order, pursuant to CPLR 3126 (3), striking the Deckelbaum defendants' answer for Mr. Deckelbaum's repeated failure to appear for a court-ordered deposition (seq. No. 7).

***(1)***

CPLR 2104 provides, in relevant part, that an out-of-court "agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney. . . ." Three pertinent principles are deducible from the decisions applying CPLR 2104. First, "for an enforceable agreement to exist, all material terms must be set forth and there must be a manifestation of mutual assent" (*Forcelli v Gelco Corp.*, 109 AD3d 244, 248 [2d Dept 2013] [internal quotation marks omitted]). Second, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed" (*Scheck v Francis*, 26 NY2d 466, 469-470 [1970]). Third, "the attendant circumstances, the situation of the parties, and the

objectives they were striving to attain" must be considered to determine whether "the parties' words and deeds establish their intent to enter into a binding agreement" (*Brighton Inv., Ltd. v Har-Zvi*, 88 AD3d 1220, 1222 [3d Dept 2011] [internal citations omitted]).

Here, the documentary evidence – in the form of the parties' e-mails and their competing drafts of the settlement agreement – provides conclusive answer that no enforceable settlement exists. First, the e-mails between plaintiff's counsel and Fleischmann are ambiguous as to which defendants were to be released under the proposed settlement. Whereas these e-mails make it clear that Fleischmann's clients (*i.e.*, the Deckelbaum defendants) were to be released under the proposed settlement, they are silent as to whether Sprei and the other defendants who are not represented by Fleischmann would also be released. The ambiguity in the e-mails has left room for different interpretations. It comes as no surprise, therefore, that a draft settlement agreement that was prepared by Fleischmann proposed to release all of the named defendants, while a draft settlement agreement, as revised by plaintiff's counsel, contemplated that only the Deckelbaum defendants would be released. This is obviously a material difference in terms, considering that the plaintiff holds an unsatisfied money judgment against Sprei. Although the parties agreed that the proposed settlement would be for $75,000, none of which to be paid by the Deckelbaum defendants, it omits a material term of whether the plaintiff would release Sprei. As stated, the drafts which the parties exchanged differ on the identity of the defendants to be released under the proposed settlement.

Second, each party expressly reserved its right to reject the proposed settlement (*see* Fleischmann's e-mail to plaintiff's counsel, dated Sept. 11, 2013 ["I have not sent (the attached draft of the settlement agreement) to my client yet and this is subject to his review. I also need to clean up the language etc. but just wanted your ok on the terms before I finalize it."]; *see also* e-mails from plaintiff's counsel to Fleischmann, dated Sept. 8 and 12, 2013, respectively ["My client agrees to settling for $75,000, subject to agreed upon settlement documents. Please send me settlement documents for review"]; ["I did not get a chance to go over the settlement agreement with my client, but attached are proposed changes to the settlement agreement. This proposed settlement agreement is subject to final approval by my client."]).

Finally and crucially, after the parties exchanged drafts of the settlement agreement, Fleischmann requested the Court to assist in finalizing a settlement (*see* Fleischmann's e-mail to the Court, dated Sept. 24, 2013 ["I believe that formal settlement negotiations with Your Honor directly will be fruitful."]; *see also* e-mail response from plaintiff's counsel of the same date ["Defendants' counsel incorrectly(,) falsely claims that 'parties had agreed on settlement terms.' No such agreement was ever made. The parties did agree to a dollar value of the settlement amount, but this was subject to agreeing on settlement terms."]). Thus, each side's counsel, in seeking judicial assistance, exercised its right to revoke its prior tentative agreement to the settlement. Moreover, one of the defendants who did not answer the complaint and who is identified in the record only as "oldenequities@gmail.com," further urged the Court by e-mails, dated Oct. 14 and 15, 2013, to hold a settlement conference to

resolve this matter.[1] Ultimately, however, no settlement was reached, with plaintiff's counsel taking a firm stand (in his Oct. 25, 2013 e-mail to Fleischmann) that there will be no further settlement negotiations until the Court rules on the validity of the purported settlement.

A combination of the foregoing factors militates against the finding that an enforceable settlement agreement was reached. Accordingly, the branch of the Deckelbaum defendants' motion for an order, pursuant to CPLR 2104 and 3212, enforcing the purported settlement agreement is denied (*see Brighton Inv.*, 88 AD3d at 1222; *Williams v Bushman*, 70 AD3d 679, 680-681 [2d Dept 2010]; *Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165, 169 [1st Dept 2007]; *Silverman v Member Brokerage Services, LLC*, 298 AD2d 381, 382 [2d Dept 2002]). In this respect, the Court finds the words of one seasoned practitioner apropos when, in reference to e-mail confirmations of stipulations, he writes: "For the present, email should only be used with care, and not for stipulations on anything really important" (Thomas F. Gleason, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C2104:4 at 512).

*(2)*

Fleischmann moves for a protective order, pursuant to CPLR 5240, to prevent the plaintiff from levying on the funds he holds in his attorney account to fund the proposed settlement. CPLR 5240 provides, in relevant part, that "[t]he court may at any time, on . . . the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any

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1. The record is unclear as to whether this defendant is Sprei.

enforcement procedure." "A motion for relief from enforcement may be made in the context of the underlying action, and a plenary action is unnecessary" (*Paz v Long Is. R.R.*, 241 AD2d 486, 487 [2d Dept 1997]).

Here, on or about Oct. 15, 2013, the plaintiff caused a Marshal's Levy and Execution with Notice to Garnishee to be served on Fleischmann against the $75,000 in settlement funds which Fleischmann is holding in his attorney account. Fleischmann is rather cryptic about the original source of these funds. He avers (in ¶ 31 of his affirmation) that the settlement funds represent the sum of (1) $70,000 which he received from his client "Deckelbaum who in turn received it from one of the Defaulting Defendants" (hereinafter, the escrow funds), and (2) $5,000 which represents a discount on his legal bill to the Deckelbaum defendants. Plaintiff, distrustful of Fleischmann, urges the Court to hold a hearing on whether the escrow funds (*i.e.*, $70,000 in Fleischmann's attorney account) may be applied in partial satisfaction of the plaintiff's money judgment against Sprei (*see* Affirmation of Solomon Rubin, Esq., dated Oct. 27, 2013, ¶ 66). Plaintiff observes that Fleischmann has annexed no documents to his (Fleischmann's) affirmation that would indicate how the escrow funds made their way into his attorney account (*id.*, ¶ 74). Plaintiff also notes that Sprei has not been served with Fleischmann's motion.

A material question of fact exists as to whether the escrow funds ($70,000) are subject to the lien of the plaintiff's money judgment against Sprei. The relevant date of inquiry is on or about Oct. 15, 2013, when the marshal served Fleischmann with a Levy and Execution

[* 7]

with Notice to Garnishee. The issue is whether, at that time, Sprei had an "interest," within the meaning of CPLR article 52, in the escrow funds; in other words, whether the escrow funds were, at that time, within Sprei's present or future control (*see Potter v MacLean*, 75 AD3d 686, 687 [3d Dept 2010]; *1420 Assocs., Inc. v Modern Landfill & Recycling*, 256 AD2d 538, 539 [2d Dept 1998]). Accordingly, the matter is referred to a Special Referee for a framed-issue hearing to establish (1) the identity of each entity (individual or corporate) which directly or indirectly transferred the escrow funds to Fleischmann; (2) the identity of each entity (individual or corporate) on whose behalf the transfers were made (for example, if the escrow funds originated from a lender, the identity of the borrower and, where the borrower is not an individual, the identity of the borrower's principals); and (3) whether any loan or escrow agreements were made by (or on behalf of) Sprei in connection with each transfer. For example, if the escrow funds originated from a lender, the inquiry would focus on (1) whether the loan was made only to accommodate Sprei in the event the settlement was reached, or (2) whether the lender has a legal right under its loan documents to reclaim the escrow funds in the event, as is the case here, the settlement is declared unenforceable (*see Mast Property Investors, Inc. v Gaines Serv. Leasing Corp.*, 194 AD2d 412, 412-413 [1st Dept 1993]; *Cascade Automatic Sprinkler Corp. v Chase Manhattan Bank, N.A.*, 60 AD2d 901, 903 [2d Dept 1978]).

The Special Referee shall hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317 (a), the Special Referee, shall hear and determine the framed issue. Plaintiff's counsel shall,

within 45 days from the date of this decision and order, serve a copy thereof with notice of entry, together with the Special Referee Order, upon the Special Referee Clerk, at Supreme Court, 360 Adams Street, Brooklyn, New York, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date. In addition, plaintiff's counsel shall serve Sprei (by regular and certified mail at his last known address, and, for the avoidance of doubt, by e-mail at oldenequities@gmail.com) with (1) a copy of this decision and order with notice of entry within 45 from the date thereof, and (2) a notice of the framed-issue hearing at least ten days prior to such hearing. Sprei is invited to appear and be heard at that time.

Until further order of the Court, the marshal's levy on Fleischmann's attorney account with respect to the escrow funds ($70,000) is stayed pursuant to CPLR 5230 (c) and 5232 (a), and Fleischmann is restrained, pursuant to CPLR 5232 (a), from transferring any portion of the escrow funds ($70,000). This directive supersedes a temporary stay imposed by the Court's Oct. 25, 2013, order to show cause, as extended by the Court's Oct. 31, 2013, short-form order.

*(3)*

In light of the parties' prior settlement negotiations, the Court declines to strike the Deckelbaum defendants' answer for Mr. Deckelbaum's repeated failure to appear for a pretrial deposition. However, the record discloses two court orders specifically directing Mr. Deckelbaum to appear for a pretrial deposition by a date certain (*see* orders, dated

Apr. 18 and June 26, 2013) and two additional court orders directing completion of discovery by a date certain (*see* orders, dated Mar. 5 and Dec. 20, 2012). Accordingly, the Court conditionally grants the plaintiff's motion to the extent that the Deckelbaum defendants' answer will be stricken unless Mr. Deckelbaum appears for a pretrial deposition within 60 days of service of this decision and order with notice of entry on Fleischmann (*see Almonte v Pichardo*, 105 AD3d 687, 688 [2d Dept 2013]).

***(4)***

The Court does not find that the Deckelbaum defendants' motion was frivolous for purposes of 22 NYCRR 130-1.1. Accordingly, the request for sanctions contained in the plaintiff's opposition papers is denied.

***(5)***

The Court, sua sponte, directs that the caption be amended to reflect the dismissal of the defendant Abraham Leser by stipulation, dated Sept. 12, 2012 (NYS CEF Doc. No. 47).

The parties are reminded of their next scheduled conference in Commercial Part 2 on Jan. 27, 2014.

This constitutes the decision and order of the Court.

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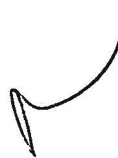

J. S. C.

HON. DAVID I. SCHMIDT

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