SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MILISSA J. MARTIN,

Plaintiff,

DECISION & ORDER
Index No. 25834/2009
Sequence no. 7

-against-

PETER F. HARRINGTON and DANIELLE K. HARRINGTON,

Defendants.

WOOD, J.

The following documents numbered 1-26 were read in connection with defendants' motion:

Defendants' Notice of Motion, Peter F. Harrington's Affidavit, Exhibits.	1-18
Plaintiff's Counsel's Affirmation in Opposition, Plaintiff's Affidavit, Exhibits.	19-23
Defendant Peter F. Harrington's Reply Affidavit, Exhibit, Reply Memorandum of Law. [1]	24-26

Defendants move for an order pursuant to CPLR 2104, enforcing the settlement agreement and dismissing this action with prejudice, or in the alternative, granting defendants leave to amend their Answer to the Amended Complaint to assert a counterclaim for promissory estoppel, and for sanctions against plaintiff pursuant to 22 NYCRR §130-1.1.

By way of background, plaintiff and defendants are next-door neighbors in a community known as Hunt Farm in Waccabuc. Plaintiff alleges in the complaint that defendants installed and

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[1]On March 25, 2015, defendants submitted a letter on the issue of whether the plaintiff waived attorney client privilege with her original attorney. That letter was not considered.

built an asphalt driveway between December 17, 2004 and December 31, 2006, which encroached upon her property and has continued to encroach upon her property. Plaintiff also accuses defendants of having installed an underground electric fence which also encroached upon plaintiff's property. According to defendants, they had no reason to believe their driveway encroached, because they hired a paving contractor to resurface their existing driveway. After reviewing plaintiff's survey, defendants decided to remove the contested portion of the driveway, and ultimately removed more of the driveway than necessary in order to eliminate future claims by plaintiff. Defendants' counsel wrote to plaintiff's counsel to resolve the lawsuit. By letter dated April 13, 2010 ("the settlement letter"), plaintiff's former counsel wrote:

> I have forwarded your letters to my client and she has authorized to make the following proposal...In order to ensure that the driveway encroachment is resolved correctly, we suggest that your client retain John J. Muldoon, the surveyor who has already surveyed the property, to line/mark the area of encroachment. That way, both your clients and my client will know that the boundary line between their two properties has been accurately delineated... If your clients accept this proposal, and acknowledge the accuracy of Mr. Muldoon's survey by permitting him to mark the line, and if your clients expeditiously undertake to remove the encroaching driveway, my client will agree to discontinue the lawsuit.
> (Exh "I" to Affidavit of Peter F. Harrington, sworn to 1/26/15)

Defendants assert that based upon the settlement letter, they hired plaintiff's surveyor to mark the property line; hired a contractor recommended and approved by plaintiff to perform the work; and obtained plaintiff's tacit on site approval as the property line was marked and the driveway reconfigured to remove more than the alleged encroachment, which cost defendants over $5,500.

Based upon the foregoing, the motion is decided as follows:

Settlement Agreement

CPLR § 2104, states,"an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered." "[T]o be enforceable under CPLR 2014 an out-of-court settlement must be adequately described in a signed writing" (Bonnette v Long Island Coll. Hosp., 3 NY3d 281, 286 [2004]). If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract (Cobble Hill Nursing Home, Inc. v Henry & Warren Corp., 74 NY2d 475, 482 [1989]).

An attorney must be specifically authorized to settle and compromise a claim, as an attorney has no implied power by virtue of his general retainer to compromise and settle his client's claim (Nash v Y&T Distributors, 207 AD2d 779, 780 [2d Dept 1994]). A party who relies on the authority of an attorney to settle an action in his client's absence deals with such an attorney at his own peril (Slavin v Polyak, 99 AD2d 466 [2d Dept 1984]). If the settlement is thereafter challenged, the relying party has the burden of establishing that the attorney's actions were, in fact, authorized. To determine apparent authority, courts consider "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (207 AD2d at 780). "The existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal-not the agent" (Ford v Unity Hospital, 32 NY2d 464,

473 [1973]). Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable (207 AD2d 779 at 781).

To determine whether the attorney had such apparent authority, the relying party (here, the defendants), must demonstrate that some kind of communication or conduct on the client's (plaintiff) part, led defendant to believe that the attorney had authority to enter into the settlement on its client's behalf (Melstein v Schmid Laboratories, Inc., 116 AD2d 632 [2d Dept 1986]).

Therefore, in order for defendants to have reasonably relied upon an appearance of plaintiff's attorney's authority to settle this case, defendants would need to establish that the conduct of plaintiff herself created the apparent authority. To that end, defendants assert that at the time plaintiff's former counsel wrote the settlement letter (April 13, 2010), he was counsel of record, having been retained by plaintiff. They cite both the plain language of the letter ("*I have forwarded your letters to my client and she has authorized me to make the following proposal*"), and the fact that the bottom of the letter indicates that the plaintiff was copied on the letter, to prove that the plaintiff was fully aware of the settlement offer. Next, on April 19, 2010, the defendants replied to the April 13, 2010 letter, embracing its terms, setting forth the dates that the surveyor would mark the property line and the asphalt contractor would do asphalt removal.

Defendants next assert that the plaintiff was physically present before, during, and after the work was done by the asphalt contractor on April 26, 2010, which is documented by photographs taken by the plaintiff herself (see exhibits "L" and "M" attached to affidavit of Peter M. Harrington, sworn to January 26, 2015). At no time did the plaintiff raise any issues with the work or her attorney's authority to enter into an agreement on her behalf, or intervene to raise any questions about the work. In response, the plaintiff states that she "was not present when it was cut back," but

she clearly was there at the time the workers were there, as demonstrated by her own photograph (see exhibit "L" attached to affidavit of Peter M. Harrington, sworn to January 26, 2015), which she did not contest, and failed to address in her affidavit in opposition. The fact that she now apparently claims to have left the area after taking the photograph (taking no other action) is arguably further proof of her assent to the agreement. Also, it is noteworthy that the plaintiff very carefully asserts, "contrary to the assertions repeated in defendants' motion papers, I never, in any way, shape or form, approved the defendants' re-cut driveway, or supervised said re-cutting" [Plaintiff's affidavit, sworn to February 13, 2015, at 15]. However, the plaintiff's actions after the re-cut contradict her statement. For over three years, the plaintiff took no action, raised no issues, sat idly by, and failed to prosecute this action, until she verbally confronted defendant Danielle Harrington on June 21, 2013. In response, five days later, it was the defendants that sent a 90 Day Notice pursuant to CPLR 3126, demanding that she resume prosecution of this case and file a note of issue. Plaintiff's (new) counsel's attempt to blame the defendants for allowing a sleeping dog to lie is not convincing. It is the plaintiff's burden to prosecute and pursue her case. While this court denied the defendants' prior motion to dismiss for want of prosecution, that does not mean that the plaintiff's (in)actions between April 13, 2010 and June 21, 2013 are not highly instructive with respect to this motion, in assessing her awareness and assent to the April 13, 2010 letter.

In contrast, plaintiff's counsel attempts to create an issue of fact as to whether the conditions of the alleged settlement were completed *inter alia,* plaintiff's surveyor may not have marked the property line prior to defendants re-cutting of their driveway. However, defendant Peter Harrington's affidavit states, "We contacted Ms. Martin's surveyor John J. Muldoon and hired him to mark the property line." The fact that his attorney's letter stated that it was marked off "using

(plaintiff) Martin's survey" is not a contradiction. Plaintiff also raises that the by-laws of the Hunt Farm Homeowners' Association ("HFHA") require prior approval for work to be completed, however, this is a red herring, and defendants point out that nowhere in the bylaws does HFHA reserve unto itself the authority to pass upon issues regarding property lines.

In the instant matter, the settlement was offered not in the context of a pre-trial conference or in open court, but was an offer that was communicated from plaintiff's former attorney. Plaintiff claims that she did not expressly authorize the attorney to settle the instant action.

Based upon the arguments of the parties and the submissions presented to the court, defendants have met their burden of showing that the plaintiff's former attorney had the apparent authority to settle the case. While the settlement letter is signed by plaintiff's former attorney and not plaintiff herself, and defendants failed to prove any overt communication by plaintiff herself that would give rise to the appearance of authority to settle this case, the inquiry does not end there. Here, no direct, overt action was required by the plaintiff to signify her agreement. The defendants were required to perform an act, after which the plaintiff would discontinue her lawsuit. The defendants performed their part of the deal, so then we turn to the conduct of the plaintiff to determine whether the actions taken by the defendants pursuant to the proposal contained in her attorney's letter were indeed expected, approved, and would resolve the underlying lawsuit. It is appropriate to consider circumstantial evidence, since the plaintiff did not actually sign a stipulation of discontinuance. She obviously had every opportunity to inspect the site. She had retained an attorney. She lived next door, and has demonstrated her ability and willingness to express her concerns and to take steps to protect her interests (see Exhibits "G" and "H" attached to affidavit of Peter M. Harrington, sworn to January 26, 2015). Yet, given these facts, had one week elapsed after

the driveway re-cut was performed, neither this court, nor any court could determine from the plaintiff's silence and inaction, whether or not she assented to the April 10, 2010 proposal. It is likely that even one month after the re-cut, that the plaintiff could have taken some action to demonstrate that she was not in agreement with the April 10, 2010 letter. But thankfully, in this case, the facts are so clear, that no reasonable argument can be made that the plaintiff was unaware of the April 10, 2010 proposal, or that she did not ratify the April 10, 2010 proposal by failing to prosecute this action or otherwise take any action for over three years after the defendants performed their obligations under the proposal.

Sanctions

The court may impose financial sanctions and/or costs upon a party or attorney who engages in frivolous conduct (22 NYCRR 130.1.1[a]; Weissman v Weissman, 116 AD3d 848, 849 [2d Dept 2014]). Conduct is frivolous if (1) it is completely without merit in law 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.l[c]. To avoid sanctions, at the least, the conduct must have a good faith basis (Dank v Sears Holding Mgt. Corp., 69 AD3d 557, 558 [2d Dept 2010]).

Based upon the record, while the facts are abundantly clear, and the outcome of this motion is in favor of the defendants, the court does not conclude that the conduct of plaintiff was frivolous within the meaning of 22 NYCRR 130–1.1(c) (see 22 NYCRR 130–1.1 [c]).

Accordingly, for the stated reasons, it is hereby

ORDERED, that defendants' motion to dismiss the complaint is granted; and it is further

ORDERED, that defendants shall serve a copy of this order with Notice of Entry upon plaintiff within 10 days of entry, and file an affidavit of service within 5 days of service; and it is further

All matters not herein decided are denied.

This constitutes the Decision and Order of the court.

Dated: **April 16, 2015**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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