

Bentz v McCarter & English, LLP
2017 NY Slip Op 32826(U)
February 7, 2017
Supreme Court, Richmond County
Docket Number: 150967/2017
Judge: Kim Dollard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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DANA MONDELLA BENTZ, As Executor of the Estate
of ARTHUR MONDELLA; and DELLS CHERRIES, LLC,
as Successor to DELL'S MARASCHINO CHERRIES, CO.,
INC.

DCM Part 4
Present:
Hon. Kim Dollard

Plaintiffs,

-against-

DECISION AND ORDER

MCCARTER & ENGLISH, LLP, and
SCOTT HOWARD BERNSTEIN,

Index No: 150967/2017

Defendants,

*motions 001
002*

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The following papers numbered 1, 2 and 3, were marked fully submitted on October 28, 2017:

Papers Numbered

Defendants Motion to Dismiss the Complaint and Attorneys Affirmation dated June 5, 2017 together with Exhibits and Memorandum of Law	1
Plaintiff's Cross-Motion To Dismiss the Defendants Motion and Affirmation in Support and in Opposition to Motion dated September 14, 2017	2
Reply Memorandum of Law on behalf of Defendants dated October 24, 2017..... (Dated May 10, 2017)	3

The defendants move to dismiss the plaintiff's complaint filed on April 26, 2017 pursuant to CPLR §3211. Previously on May 14, 2016, the plaintiff filed an initial complaint under index number 150595/2016 against the same defendants in the present action.

The defendants, MCCARTER & ENGLISH, LLP, and SCOTT HOWARD BERNSTEIN, moved to dismiss the first complaint on the ground that it failed to state a cause of action. The stipulation, which was "So Ordered" by this Court on October 28, 2016, states that the motion to discontinue the complaint is granted and that plaintiff is granted leave to file a new complaint with a new index number on or before November 18, 2016.

Plaintiff filed a new complaint on April 26, 2017 in the present action , over five months past the stipulated and “so ordered” time period.

The defendants now move to dismiss the second complaint as untimely and further assert that the second complaint contains the same claims previously found not to state a cause of action. Defendants argue that the stipulation is a binding agreement that counsel for the plaintiff freely entered into and which must be upheld by the court. Defendants asserts that only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation (citing Hallock v. State, 64 N.Y.2d 224, 230, 1984).

The defendants further argue that the second complaint contains no new factual allegations, and like the first, fails to state a cause of action.

In opposition, plaintiff argues that they should be permitted to institute a new action pursuant to CPLR §205 within six months of the “So Ordered Stipulation” since the action was not dismissed on the merits.

For the reasons set forth herein, the defendants motion is granted and the second complaint is dismissed.

A stipulation is an independent contract between the parties (*see McWade v. McWade, 253 A.D.2d 798 [677 N.Y.S.2d 596]*), and will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability (*Jablonski v. Jablonski, 275 A.D.2d 692, 693, 713 N.Y.S.2d 184*). Even a stipulation which was improvident will not be set aside unless it is manifestly unfair or unconscionable” (*Cavalli v. Cavalli, supra at 667, 641 N.Y.S.2d 724*).

Therefore, having stipulated and agreed to start a new action by November 18, 2016, the plaintiff was obligated to do so. Plaintiff entered into a stipulation and there is no claim or proof of any fraud, duress, overreaching or unconscionability. Accordingly, the stipulation is binding on the parties.

The plaintiff's reliance upon CPLR §205 is misplaced. CPLR §205, by its terms, only applies to actions timely commenced and "terminated in any other manner than by a voluntary discontinuance . . .". In the present action, the "so ordered" stipulation indicates that the plaintiff voluntarily agreed to discontinue the action and to file a new complaint by November 18, 2016. Therefore, CPLR §205 is not applicable, where as here, there was a voluntary discontinuance.

Accordingly, the plaintiff's second complaint under Index Number 150967/2017 is dismissed as untimely.

Furthermore, the court finds that the second complaint is factually identical to the first complaint. Therefore, even if the complaint were permitted to stand, it would be dismissed for failing to state a cause of action. The factual allegations in the complaint do not state cognizable causes of action for breach of fiduciary duty, breach of contract, unjust enrichment, negligence or professional negligence.

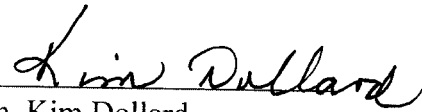
Accordingly, based upon the foregoing, it is,

ORDERED, that the defendant's motion pursuant to CPLR §3211 to dismiss the complaint under Index Number 150967/2017 is granted; and it is further,

ORDERED, that the plaintiffs' cross-motion to dismiss the defendants' motion and to set a discovery schedule is denied.

Dated: February 7, 2017

ENTER



Hon. Kim Dollard
Acting Justice Supreme Court