

**East Broadway Real Estate Holdings, LLC v R&S  
Constrs. of NY, LLC.**

2018 NY Slip Op 33723(U)

September 28, 2018

Supreme Court, Kings County

Docket Number: 501364/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28<sup>th</sup> day of September, 2018.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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EAST BROADWAY REAL ESTATE HOLDINGS, LLC,

*Plaintiff,*

- against -

R&S CONSTRUCTIONS OF NY, LLC., and  
SHENG SHENG CONSTRUCTION, INC.,

*Defendants.*

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Index No.: 501364/2017

DECISION AND ORDER

Motions Sequence #2, #3

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4</u>
Opposing Affidavits (Affirmations).....	<u>5.</u>
Reply Affidavits (Affirmations).....	<u>6.</u>

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Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff East Broadway Real Estate Holding, LLC. (hereinafter “the Plaintiff”) had commenced this action against Defendant R&S Constructions of NY, LLC. (hereinafter “Defendant R&S”) and Sheng Sheng Construction, Inc. (hereinafter “Defendant Sheng”) and seeking a declaratory judgment naming the Plaintiff as an additional insured under certain insurance policies procured by Defendant R&S and Defendant Sheng. Plaintiff also sought relief finding that Defendant R&S and Defendant Sheng are obligated to defend and indemnify Plaintiff for the claims asserted in an underlying personal injury action brought by Ariel Rivera (Kings County, Index Number 502156/2016) against the Plaintiff, Defendant R&S and N.Y. Drilling Inc. (hereinafter “the Rivera action”) and that Defendant R&S and Defendant Sheng are obligated to reimburse the

Plaintiff the defense costs and attorneys fees related to the Rivera action. On or about March 6, 2017, the Plaintiff entered into a stipulation with Defendant R&S that discontinued the action as to Defendant R&S with prejudice.

The Plaintiff now moves for an order pursuant to CPLR §§2104 and 3217 vacating the stipulation of discontinuance between the Plaintiff and Defendant R&S. The Plaintiff contends that the stipulation of discontinuance should be vacated because the Plaintiff relied on misrepresentations made by Defendant R&S. Specifically, the Plaintiff contends that it agreed to discontinue the proceeding with prejudice as against Defendant R&S solely as a result of the alleged position taken by Defendant R&S that it was not involved in the alleged accident at issue in the Rivera Action. The Plaintiff further contends that Defendant R&S relied on the contract between the Plaintiff and Defendant R&S to convince the Plaintiff to discontinue the proceeding against Defendant R&S. The purportedly relevant part of that contract between the Plaintiff and Defendant R&S stated that Defendant R&S was not to commence work until after the completion of the foundation at the site. The alleged incident at issue in the underlying personal injury action allegedly occurred prior to completion of the foundation.

The Plaintiff therefore contends that the stipulation of discontinuance should be vacated because there is evidence that Defendant R&S was performing excavation related work at the purported site of the Rivera Action. Such evidence includes New York City Department of Buildings documents such as work permits issued to Defendant R&S in January of 2016 and violations issued by the NYC Department of Buildings to Defendant R&S in July of 2016. Both are in relation to the subject site. The Plaintiff contends that this evidence constitutes misrepresentation on the part of Defendant R&S which should lead the Court to vacate the stipulation of discontinuance between the parties.

Defendant R&S opposes the motion and cross moves for an order pursuant to CPLR §2104 to enforce the stipulation of discontinuance between the Plaintiff and Defendant R&S. In the alternative, Defendant R&S seeks an order pursuant to CPLR §3211(a)(4) dismissing the claims asserted in this action as against Defendant R&S as duplicative of claims in the Rivera Action. Specifically, Defendant R&S contends that the stipulation of discontinuance between the Plaintiff and Defendant R&S should not be vacated given that it was agreed to by these parties after Defendant R&S explained that the instant proceeding was duplicative of the Rivera action and also because Defendant R&S did not supervise Mr. Rivera's employer Defendant Sheng and was not yet on site when the alleged incident occurred. Defendant R&S further argues that the documents put forth by the Plaintiff were available at the time the stipulation of discontinuance was executed and also that the filing of permits and the mailing of notices do not mean that Defendant R&S acted as a general contractor. What is more, Defendant R&S contends that even though violations were issued against it, the Plaintiff ultimately paid the fines for these violations and Defendant R&S never admitted any guilt in connection with the violations and fines assessed. In the alternative, Defendant R&S seeks an order pursuant to CPLR §3211(a)(4) dismissing the claims in this action as duplicative of claims in the companion action.

In general, “[a]n ‘open-court stipulation is an independent contract between the parties ... and will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability.’” *Ross v. Clyde Beatty-Cole Bros. Circus*, 26 A.D.3d 321, 322, 812 N.Y.S.2d 548, 548 [2<sup>nd</sup> Dept, 2006], *quoting Shuler v. Dupree*, 14 A.D.3d 548, 548, 789 N.Y.S.2d 197, 197 [2<sup>nd</sup> Dept, 2005]. “Courts will generally not vacate agreements on the ground of unilateral mistake where the mistake was the result of negligence or the failure to exercise ordinary care.” *ATS-1 Corp. v. Rodriguez*, 156 A.D.3d 674, 676, 67 N.Y.S.3d 60, 62–63 [2<sup>nd</sup> Dept, 2017]. “A party

seeking reformation of a contract by reason of a mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation." *Yu Han Young v. Chiu*, 49 A.D.3d 535, 853 N.Y.S.2d 575 [2<sup>nd</sup> Dept, 2008].

Turning to the merits of the motion to vacate the stipulation of discontinuance between the Plaintiff and Defendant R&S, the Court finds that the Plaintiff has failed to show that the stipulation of discontinuance was executed by mistake induced by Defendant R & S's fraudulent misrepresentation. In support of their motion, the Plaintiff points to what it contends is evidence that shows that Defendant R&S was in fact performing excavation related work purportedly at or around the time of the alleged incident. However, the evidence annexed to the motion does not clearly indicate that Defendant R&S was engaged in work at the time of the alleged accident. What is perhaps more significant, the documents all relate to a violation issued by the Department of Buildings which documents were publicly available on the Department of Buildings website prior to the date of the stipulation of discontinuance. This is significant because it indicates that, even assuming, *arguendo*, that these documents do show that Defendant R&S was engaged in excavation work at the time of the alleged accident, the Plaintiff's lack of knowledge of the existence of the documents was not predicated on Defendant R&S's alleged willful misrepresentation in that the Plaintiff could have confirmed Defendant R&S's purported representation by a review of publicly available documents. For example, the work permit for Defendant R&S was filed on December 29, 2015, and the Department of Buildings violation was issued on January 4, 2016. These documents were all publicly available well before the parties entered into the Stipulation of Discontinuance dated on or about March 6, 2017. Accordingly, the Plaintiff's motion is denied and the cross-motion by Defendant R&S is otherwise deemed moot and also denied.

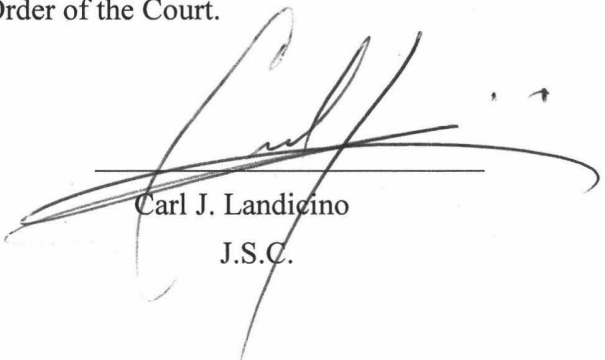
Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion is denied.

The cross motion by Defendant R&S is also denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino  
J.S.C.



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