

278 W 127 Prop LLC v Gordon
2019 NY Slip Op 33319(U)
November 6, 2019
Supreme Court, New York County
Docket Number: 153369/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM
Justice

-----X
278 W 127 PROP LLC,

INDEX NO. 153369/2016

Plaintiff,

MOTION SEQ. NO. 004

- v -

CLEMENT GORDON JR. and CLEMENT H. GORDON III,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 67, 68, 69, 74, 77

were read on this motion to/for

ENFORCE STIPULATION

In this action by plaintiff 278 West 127 Prop LLC seeking declaratory relief as against defendants Clement Gordon Jr. and Clement H. Gordon III, defendants move, by order to show cause, for an order enforcing a stipulation of discontinuance signed by the parties on July 2, 2019. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL HISTORY:

The facts of this action are set forth in detail in the order of this Court entered September 23, 2016. Doc. 19. Any additional relevant facts are set forth below.

On July 2, 2019, counsel for the parties appeared for a judicial mediation before this Court (Kaplan, J.).¹ As a result of the mediation, the parties entered into a stipulation that day providing as follows:

1. At a closing convened among the parties, defendants shall be paid \$500,000 in consideration of executing any necessary documents pertinent to 278 W[est] 127th St. within 60 days of today.²
2. If (1) above fails to eventuate due to plaintiff's failure to pay the consideration, plaintiff & defendants agree to stipulate to discontinue this matter with prejudice.

Doc. 66.

Defendants now move, by order to show cause and pursuant to CPLR 2104, to enforce the stipulation. In support of the motion, defendants argue that, since plaintiff did not pay them \$500,000 within 60 days after July 2, 2019, plaintiff is required by the stipulation to discontinue the action. Although defendants acknowledge that a stipulation may be vacated under limited circumstances, such as where fraud, collusion, mistake, or accident can be demonstrated, they maintain that none of those exceptions exist herein. They also assert that plaintiff must reimburse them \$2,500 for the costs of bringing the instant application since the motion would have been unnecessary if plaintiff had complied with the stipulation.

In opposition, plaintiff argues that the stipulation cannot be enforced because it is ambiguous and contradictory. Specifically, urges plaintiff, the stipulation requires plaintiff to

¹ Although counsel for plaintiff maintains that the judicial mediation occurred on July 2, 2018, this Court's records reflect that a judicial mediation was conducted on July 2, 2019 and not on July 2, 2018.

² The phrase "within 60 days of today" was written in blue ink and was initialed by counsel for one of the parties.

pay defendants \$500,000 “at a closing” and also “within 60 days”, even if a closing does not occur. Plaintiff also argues that the words “within 60 days of today” were added to the stipulation after it was drafted, and that the additional phrase was initialed only by one of the defendants.

LEGAL CONCLUSIONS:

“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.” *Hallock v State of New York*, 64 NY2d 224, 230 (1984). Since plaintiff failed to establish grounds for vacating the stipulation, it remains enforceable. In so holding, this Court notes that a party seeking to vacate a stipulation must do so promptly. *see Hallock*, 64 NY2d at 231 (stipulation enforced where party challenging the agreement waited more than two months to do so). Although the stipulation in question was executed on July 2, 2019, plaintiff did not contest the terms thereof until October 14, 2019, more than three months later, when it submitted opposition to this motion. Thus, plaintiff “acquiesced in, consented to, and is bound by” the stipulation. *Hallock*, 64 NY2d at 231.

Although plaintiff argues that one of the defendants improperly added language to the stipulation and initialed the additional language, it does not assert that its attorney was not present when the additional language was added and/or that it was prejudiced by the added language.

Even assuming, arguendo, that an ambiguity exists in the stipulation, the agreement nevertheless requires plaintiff to discontinue the action with prejudice. The stipulation required plaintiff to pay defendants \$500,000 at a closing in consideration for the defendants executing

“any necessary documents pertinent to 278 W[est] 127th St. within 60 days of today.” Whether the closing was to be held within 60 days after execution of the stipulation or the documents relating to the premises were to be executed by defendants within 60 days is of no moment herein, since more than 60 days have elapsed and neither of those events has occurred. Since the requirements of paragraph 1 of the stipulation “fail[ed] to eventuate due to plaintiff’s failure to pay the consideration [of \$500,000]”, the action must thus be discontinued pursuant to paragraph 2 of the stipulation.

Although not addressed by plaintiff, that branch of defendants’ motion seeking to recover legal fees in the amount of \$2,500 from plaintiff is denied since the movants failed to formally and specifically demand such fees in the order to show cause or in their “wherefore clause”. *See* CPLR 2214 (a); *Arriaga v Michael Laub Co.*, 233 AD2d 244, 245 (1st Dept 1996). Even if defendants were legally entitled to such fees, they provide absolutely no basis for their claim that the fees owed total \$2,500.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants Clement Gordon Jr. and Clement H. Gordon III seeking to enforce the stipulation dated July 2, 2019 is granted; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, defendants are to serve a copy of this order, with notice of entry, on plaintiff; and it is further

ORDERED that, within 20 days after plaintiff is served with a copy of this order with notice of entry, plaintiff is to serve on defendants, and file with this Court (with a courtesy copy to chambers), a stipulation of discontinuance; and it is further

ORDERED that the branch of the motion by defendants Clement Gordon Jr. and Clement H. Gordon III seeking to recover legal fees from plaintiff is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

11/6/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE