

Kahler v Kahler

2020 NY Slip Op 31959(U)

May 15, 2020

Supreme Court, Suffolk County

Docket Number: 15-1525

Judge: C. Randall Hinrichs

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ORIGINAL

7/13/2020 11AM
Hearing
control date
AMT

SHORT FORM ORDER

INDEX No. 15-1525
CAL. No. 15-01918EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. C. RANDALL HINRICHS
Justice of the Supreme Court

MOTION DATE 12-20-18
ADJ. DATE 2-19-19
Mot. Seq. # 006 - Mot D

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GENEVIEVE KAHLER,

Plaintiff,

- against -

ANNA KAHLER,

Defendant.

-----X

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Upon the following papers numbered 1 to 17 read on this motion for enforcement of settlement and attorney's fees:
Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers ;
Answering Affidavits and supporting papers 10-13; Replying Affidavits and supporting papers 14-17; Other ; (and after
hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff Genevieve Kahler for, inter alia, an order granting judgment in her favor in the sum of \$26,595.93, fixing and determining any all credits due to plaintiff, and granting plaintiff \$7,500.00 in legal fees as a result of defendant Anna Kahler's breach of the settlement agreement dated July 12, 2017, and to direct a hearing to determine the reasonable legal fees incurred by plaintiff as a result of the breach is decided as follows; and it is

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant Anna Kahler by certified mail, return receipt requested, and upon defendant's counsel, Lisa A. Perillo, by ordinary mail, within 20 days of the date of this order; and it is

ORDERED that plaintiff shall file proof of such service with the Clerk of the Court within 10 days after service has been effected; and it is further

ORDERED that the Clerk of the Court shall set this matter down for a hearing on the first available date.

Plaintiff Genevieve Kahler commenced this action against defendant Anna Kahler to impose a constructive trust on real property located at 486 Lombardy Boulevard, Brightwaters, New York. Prior to the start of the trial, on July 12, 2017, the parties entered into a stipulation of agreement and settlement that was read on the record and so ordered by the Honorable W. Gerald Asher on July 27, 2017. Subsequently, defendant vacated the premises on July 7, 2018, and the premises were sold on October 1, 2018 for approximately \$415,000.00.

The terms of the stipulation, in pertinent part, are as follows:

1. The property is to be transferred from Anna Kahler, as sole owner, to the Genevieve A. Kahler Trust as owner via bargain and sale deed;
2. Genevieve A. Kahler Trust, as owner, is to have 60% interest in the property and Anna Kahler is to have 40% interest in the property;
3. The parties agree to place the property on the market for sale at fair market value on or before February 1, 2018, to distribute the net proceeds from the sale of the premises on a 60/40 basis, and to sell the property to first bonafide buyer offering a sum within 5% of the listing price or such different prices as agreed upon between the parties;
4. Anna Kahler agrees to fully cooperate in facilitating the sale of the premises, including making the home available to buyer's agent or inspection within 48 hours of a request from the listing broker, broker open houses, and the placing of for sale signs in the yard, and failure to do so will result in the installation of a locked box to help facilitate the sale of the premises;
5. The sale of the premises to be delayed until after the graduation of Anna Kahler's youngest son from high school, allowing Anna Kahler to exclusively reside in the home with her children until July 7, 2018, and once an offer is accepted, the closing for the premises shall not occur before July 7, 2018;
6. Anna Kahler is required to pay 100% of the carrying charges for the house, including, but not limited to the real property taxes, including the town and village taxes and county taxes, landscaping, and all other expenses associated with the property while in residence; and if there are any balances owed for any carrying charge at the time of closing, Anna Kahler is solely responsible to pay same from her share of the net proceeds;
7. Anna Kahler shall provide Genevieve Kahler with proof of payment of real property taxes, county and village, and shall maintain the property in good condition until the sale of the property, and perform reasonable repairs until the date of closing;
8. No substantial changes or alterations are to be made to the home that will substantially reduce the value of the property, require a permit or

- certificate of occupancy, and neither party will do anything to encumber the property;
9. Anna Kahler is to add the trust as an additional insured on the homeowner's insurance policy;
 10. Anna Kahler, upon vacating the property, is to leave the property in broom clean and vacant condition;
 11. Parties are to share in carrying charges on the premises on a 60/40 basis from the date Anna Kahler indicates the property is broom clean, vacant and prepared to turn over to a purchasers;
 12. In the event there are any legal or Court fees against either party as a result of the party's failure to cooperate, the fees shall be deducted from the party's share of the settlement and not from the gross proceeds; and
 13. The defaulting party shall be liable and pay to other reasonable attorney fees for enforcing such performance.

Plaintiff now moves, by order to show cause, for an order awarding judgment in her favor in the amount of \$26,595.93 on the basis that defendant breached the so-ordered stipulation of settlement. Plaintiff alleges that defendant breached not only the expressed language of the agreement, but also the spirit of the agreement, because she refused to cooperate in good faith in showing the subject premises, failed to keep the premises in good condition, and refused to vacate the subject premises until there was a meeting between herself, plaintiff's attorney, and an attorney, who alleges he did not represent defendant, but is a friend of the family hoping to expedite a resolution. Plaintiff asserts that, following the meeting, plaintiff initially agreed to sign the contract of sale for the premises and later, after additional discussions, agreed to sign a document indicating that she has surrendered possession of the property. Plaintiff contends that defendant did not share in the apportionment of the legal work in representing the seller as required under the settlement, although she did agree to allow plaintiff's attorney to deduct the fees from the proceeds for plaintiff's attorney performing all of the legal work for the closing. In addition, plaintiff seeks to have the matter set down for a hearing to determine the reasonable legal fees due as a result of defendant's breach. In support of the motion, plaintiff's submit a copy of the so ordered stipulation dated July 12, 2017, the affidavit of Michael Kahler, copies of the receipts for payment of the bills allegedly accrued in regards to this matter, a letter, dated June 18, 2018, from the listing broker for the property, Tanya Fuchs, and the signed escrow agreement, dated October 1, 2018, between Michael Kahler, as Trustee of the Genevieve A. Kahler Trust, and Anna Kahler, holding the sum of \$26,595.93 in escrow.

Defendant opposes the motion on the ground that the relief sought by plaintiff overlaps and should not be sought cumulatively. Specifically, defendant contends that the stipulation states that from the date she vacated the premises on July 7, 2018 until the closing on October 1, 2018, she and plaintiff were required to share in the carrying cost of the premises on a 60/40 basis, and that she has not been provided with the underlying receipts of the bills allegedly incurred by plaintiff in connection with the sale of the premises. However, defendant does admit that she owes the Town of Islip taxes from January 2018 through July 7, 2018, plus the associated late charges, in the amount of \$106.58. Defendant further asserts that plaintiff has not properly laid the foundation to recoup attorney's fees, because the Court

failed to explain to her, a pro se defendant in the underlying action, the shifting of attorney's fees in the agreement despite explaining the substance of the agreement, since the allocation of the agreement was done by plaintiff's attorney. In opposition to the motion, defendant submits her own affidavit.

Michael Kahler, who is the trustee of the Genevieve A. Kahler Trust, and the son of Genevieve Kahler, has submitted an affidavit on behalf of plaintiff and in support of the motion. Michael Kahler states in his affidavit that as a result of the settlement and his status as trustee he was compelled to advance certain sums as a result of defendant's breach of the settlement agreement. Michael Kahler states that defendant, as a result of the stipulation, was required to add the trust as an additional insured on the homeowner's insurance policy, and that, despite numerous requests, she failed to do so, causing him to advance the sum of \$1,791.00 to procure the insurance. He states that when defendant vacated the premises she failed to leave it in broom clean condition, which resulted in him having to rent a dumpster to remove the debris that was left behind, and that she failed to maintain the landscaping, pay the utilities and the taxes. Michael Kahler states that he had to purchase a backup generator, propane tank, and regulator, because defendant removed the items from the property. He states that he was required to reimburse a potential buyer \$500.00 after defendant refused to allow the purchaser's home inspector to enter the home. Michael Kahler further states that he was unable to market the property until defendant vacated the premises, which finally was accomplished with the efforts of his attorney, resulting in additional fees billed to the trust.

Defendant in her affidavit states that she owes the Town of Islip taxes in the amount of \$106.58 from January 2018 through July 7, 2018, that she does not owe the Village of Brightwaters taxes in the amount of \$1,648.00, since the amount was billed in July and she vacated the premises by July 7, 2018, and that she does not owe \$650.00 plus a service fee of \$60.74 to the Suffolk County Water Authority (SCWA). Defendant explains that this expense was not contemplated by the stipulation because when the premises originally were built, the original owner failed to connect the meter as required and the oversight only was recently discovered by her brother, Michael Kahler, prior to selling the premises. She states that she does not owe National Grid the sum of \$23.56 or a total of \$110.83 to PSEG, since her bills were completely paid when she vacated the premises, and plaintiff has not provided her with any documentation to show how the amounts were calculated. Defendant states that she does not owe \$465.00 for the recording of the deed for the premises, and, again, plaintiff has not provided her any documentation or receipting concerning this expense.

Additionally, defendant states that she is not responsible for the \$500.00 cost of the home inspection that her brother, Michael Kahler, reimbursed to potential buyers, because she had to undergo emergency laser eye surgery for a torn retina on the date of the inspection. She states she was informed the morning of the inspection about the emergency, that she phoned the realtor at approximately 1:00 p.m. to inform her the 4:30/5:00 p.m. inspection needed to be rescheduled, but her request was ignored. Defendant states that the \$8,996.00 cost of the generator was not included in the description of the house when it was listed, that it is not a fixture of the house, and that, approximately three years ago, while she and her sons were on vacation, and her mother, Genevieve Kahler, moved from the premises, the generator disappeared; therefore, she does not owe this amount. She also states that her brothers arranged to have the generator removed from the home. She states that the propane tank was rented and that prior to vacating the premises she informed her propane supplier that she was moving and the

supplier came and removed the tank, so she does not owe the amount of \$476.62, the cost to replace the tank and regulator for propane gas. Furthermore, defendant states that she fully complied with the requirement to add the trust onto the home insurance, therefore, she is not liable for the \$1,791.00 that plaintiff paid to obtain insurance for the home, and nor, does she owe \$280.00 for landscaping, since she offered to perform the landscaping once a week, but her brother, Michael Kahler, informed her that he would take care of the cost of the landscaping. She further states that she does not owe \$335.00 for the cost of the dumpster, because she fully complied with the stipulation, leaving the home in good, clean, and orderly condition, and that the items left in the home belonged to her mother or the prior owner. Lastly, defendant states that she did not agree to pay for attorney's fees, that the stipulation does not contemplate it, and that if, she owes any money for any of the items based upon the stipulation, she only owes a percentage, 40%, for any amounts due from July 7, 2018 through October 1, 2018.

An oral stipulation of settlement made in open court and stenographically recorded is enforceable as a contract according to its terms, and governed by principles of contract law for its interpretation and effect (*Town of Warwick v Black Bear Campgrounds*, 95 AD3d 1002, 943 NYS2d 608 [2d Dept 2012]; *Alshawhati v Zandani*, 82 AD3d 805, 918 NYS2d 173 [2d Dept 2011]; *Matter of Weiss v Weiss*, 289 AD2d 498, 735 NYS2d 582 [2d Dept 2001]; *Carnicelli v Carnelli*, 205 AD2d 726, 613 NYS2d 702 [2d Dept 1994]). The role of the court is to determine the intent and purpose of the stipulation based on an examination of the record as a whole (see *Matter of O'Rourke*, 98 AD3d 1120, 951 NYS2d 181 [2d Dept 2012]; *Koppie v Koppie*, 62 AD2d 666, [2d Dept 2009]). Therefore, a breach of a settlement agreement is governed by the same law generally applicable to breach of contract (*Eichler v Town of Cortlandt*, 39 AD3d 464, 833 NYS2d 216 [2d Dept 2007]). "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*El-Nahal v FA Mgt.*, 126 AD3d 667, 668, 5 NYS3d 201, 202 [2d Dept 2015]).

Here, an examination of the stipulation of settlement entered into between the parties and the record as a whole establishes a clear and unambiguous intent expressed by the parties that the property, which was to be sold, would be transferred to defendant and the Genenieve A. Kahler Trust, with the trust owning 60% of the property and defendant owning 40%; that defendant was required to vacate the subject premises on July 7, 2018; that defendant was required to leave the premises in broom clean and vacant condition; that defendant was to pay all carrying cost while occupying the residence; that defendant was not to make any substantial changes to the property that would result in a reduction of its value; and that defendant was to fully cooperate with the listing broker in selling the premises. Thus, based upon the adduced evidence, plaintiff has established that defendant clearly failed to comply with the terms of the stipulation, which led to plaintiff incurring additional expenses (see *Town of Carmel v Melchner*, 105 AD3d 82, 962 NYS2d 205 [2d Dept 2013]; *Koppie v Koppie*, *supra*; *Fukilman v 31st Ave. Realty Corp.*, 39 AD3d 812, 835 NYS2d 343 [2d Dept 2007]). Contrary to defendant's contention that she only is required to pay 40% of any of the expenses that arose from the time she vacated the premises until the closing, the 60/40 split between plaintiff and defendant as contemplated by the stipulation only is triggered once plaintiff indicates the property is broom clean, vacant and prepared to turn over to a purchaser. However, this provision in the settlement did not become operational, because defendant failed to leave the premises in a broom clean and vacant condition, ready to turn over to a purchaser, and thus, defendant is liable to plaintiff for the expenses he incurred to prepare the house to

sell. In addition, it is clear from the evidence submitted that defendant was not cooperative in ensuring that the property sold in a timely fashion to a buyer who was ready, willing and able to purchase the property at the listed price.

Although defendant submits evidence to show that she did comply with the requirement to add the trust to the existing homeowner's insurance, a letter dated February 5, 2018 was sent to defendant by plaintiff's counsel informing her that she was in default of the settlement agreement for failing to amend the homeowner's insurance to add the trust, and yet, plaintiff failed to submit any documentation to plaintiff to resolve the issue. Therefore, plaintiff is entitled to reimbursement in the amount \$1,791.00.

And since the stipulation states neither party shall do anything to encumber the property or to make any substantial changes or alterations to the home, resulting in the substantial reduction of the value of the property, or requiring a permit or certificate of occupancy, plaintiff also is entitled to reimbursement in full for the following items since the property was not salable without such: SCWA (\$650.00 plus service cost of \$60.74); Taxes for the Town of Islip (\$10,759.13) and the Village of Brightwaters (\$1,648.20); the recording of the deed (\$465.00), the Home Inspection (\$500.00), the cost to replace the generator (\$8,996.00), and the dumpster for debris removal (\$335.00).

However, in regards to the bills for landscaping (\$280.00), National Grid (\$23.56), and PSEG (\$110.83), these bills are to be shared between the parties on a 60/40 split, since the stipulation says defendant is responsible for any carrying charges at closing, and the bills submitted by plaintiff show that at the time defendant vacated the premise, the balances on the above listed utilities were zero. Thus, defendant is responsible for the payment of \$112.00, \$9.24, and \$44.33 to plaintiff. Moreover, since defendant established that the propane tank was rented and that her propane supplier removed the tank once she vacated the premises, defendant is not required to reimburse plaintiff for the installation of a new propane tank.

Finally, the stipulation clearly provides for the allocation of attorney's fee in the event of a breach or default by either party of the agreement. Therefore, plaintiff's attorney is entitled to reasonable attorney's fees based on the legal representation provided as a result of plaintiff's breach of the agreement (see e.g. *Matter of Ruth S. (Sharon S.)*, 125 AD3d 978, 5 NYS3d 135 [2d Dept 2015]; *Sweeney v Sweeney*, 71 AD3d 989, 898 NYS2d 560 [2d Dept 2010]).

Accordingly, plaintiff's motion is granted to the extent that he is entitled to a money judgment in the amount of \$25,205.07, plus attorney's fees. The matter shall be set down for a hearing to determine the reasonable legal fees due plaintiff's attorney.

Dated: May 15, 2020



J.S.C. 

____ FINAL DISPOSITION NON-FINAL DISPOSITION