**Keller-Perkins v Prestigiacomo**

2020 NY Slip Op 34406(U)

May 6, 2020

Supreme Court, Westchester County

Docket Number: 66501/2016

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---------------------------------------------------------------------x
MIRIAM KELLER-PERKINS,

Plaintiff,

-against-

SALVATORE M. PRESTIGIACOMO,

Defendant.
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DECISION and ORDER

Motion Sequence Nos. 5 & 6
Index No. 66501/2016

RUDERMAN, J.

The following papers were considered in connection with defendant's motion for an order enforcing the parties' stipulation of settlement (sequence 5), and plaintiff's cross-motion for an order vacating the portions of the stipulation of settlement which require plaintiff to sell portions of her real property to defendant, directing defendant to remove his fence from plaintiff's real property, and scheduling this matter for trial (sequence 6):

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Exhibits A - D | 1 |
| Notice of Cross-Motion, Affidavit, Affirmation, Exhibits A - C | 2 |
| Affidavit in Reply and Opposition Exhibits A - C, Affirmation | 3 |
| Reply Affirmation on Cross-Motion, Exhibits A - S | 4 |

This action was commenced on October 19, 2016, based on claims that defendant's property encroached on plaintiff's property. When the parties appeared before this Court for trial on January 31, 2019, they entered into a settlement on the record, disposing of all claims. Pursuant to that stipulation, the action would be resolved by defendant's purchase from plaintiff of the portions of her property termed the "driveway easement" and the driveway encroachment," for a price of $10,000.00, with the closing to take place "on or about 60 days

from" the date of the stipulation. As to another claim raised by plaintiff, of a possible encroachment by defendant's fence, it was agreed on the record that plaintiff would obtain a "survey reading/survey certification" of a previous survey dated April 26, 2016, which was part of the joint trial record, Exhibit H. The on-the-record stipulation included the agreement that the parties would cooperate with the Town of Greenburgh in effectuating this agreement.

In a previous motion by defendant for an order enforcing the stipulation (motion sequence 4), defendant asserted that plaintiff had not complied with the stipulation's provision that the closing on the sale would occur within approximately sixty days. In her opposition to the motion, plaintiff disputed defendant's assertion that the stipulation provided for a mere survey reading; she insists that the agreement entitled her to obtain a new survey, but explained that she had not been satisfied with the survey she arranged, and wanted to obtain another, new survey from another surveyor. This Court's decision and order dated December 11, 2019 rejected that rationale for failing to close pursuant to the stipulation; however, it did not grant defendant's motion, due to a new issue, raised by post-submission letters regarding the need for obtaining a variance from the Town of Greenburgh in order to effectuate the contemplated sale. The decision instructed that if relief was sought on that basis by either party, a motion based on supporting evidentiary materials was necessary.

Defendant now moves, again, for an order pursuant to CPLR 2104, enforcing the stipulation. Defendant observes that the driveway easement and driveway encroachment were staked out by plaintiff's surveyor in October 2019, but that plaintiff has refused to proceed with the application for a variance from the Town of Greenburgh, needed for sale of the easement and encroachment to defendant. Counsel for defendant asserts in his affirmation that plaintiff did not cooperate in any attempt to apply for such a variance.

In plaintiff's cross-motion, it is asserted that the new survey plaintiff obtained shows that defendant's fence extends up to nine inches into plaintiff's property, and that defendant has failed and refused to move the fence in compliance with the stipulation. With regard to the agreed-upon sale of the driveway easement and driveway encroachment, plaintiff asserts that she has now learned that her property is located within an R-10 One Family Residence Zoning District, which requires a minimum lot size of 10,000 square feet, and that the property is already below that minimum, such that a variance was required at the time of its construction in 1963. She submits an email dated September 23, 2019 from Aaron Schmidt, Deputy Commissioner of Greenburgh's Department of Community Development and Conservation, stating that the contemplated sale would require "Subdivision approval through the Town of Greenburgh Planning Board, compliant with Chapter 250 of the Town Code," and that

> "since [the] property consists of 8,878.998 square feet . . . and is located within an existing R-10 One-Family Residence zoning district which requires a minimum lot size of 10,000 square feet pursuant to Section 285-14 of the Town Zoning Ordinance, and would be reduced in size as a result of this sale of land, it would appear that area variance(s) through the Town of Greenburgh Zoning Board of Appeals would be required in connection with this proposal, subject to a final determination by the Town Building Inspector."

Plaintiff further asserts that she was told that the proposed sale of portions of her Property would automatically void any and all variances previously granted when the house was built in 1963.

Based on the foregoing information and evidentiary submissions, plaintiff contends that the portions of the stipulation in which she agreed to sell portions of her property must be set aside on the ground of mistake (citing *Cabbad v Melendez*, 81 AD2d 626 [2d Dept 1981]).

Finally, she adds that a trial is necessary to address her claim for the removal of the defendant's gas and water lines from her property.

Defendant's reply papers disputes plaintiff's claim that the new survey establishes an encroachment on plaintiff's property by defendant's fence, and challenge plaintiff's assertions regarding a right to relief based on the location of the gas and water lines to defendant's property.

The parties' respective moving papers also dispute the import of this Court's observation in the decision and order dated December 11, 2019 that in a telephone conference, "the attorneys agreed to work together and cooperate in the attempt to obtain the necessary variance." Plaintiff protests that she never agreed to obtain a variance from the Town; she states, "I have never wavered on the condition in the Stipulation that I would only transfer the two portions of the Perkins Property provided that the Perkins Property would remain in compliance with the Town of Greenburgh codes and ordinances following such sale."

Plaintiff's submissions in reply to her cross-motion include a significant amount of new and more thorough information and evidentiary materials regarding the required process for obtaining the necessary variance. They include a 76-page document that plaintiff identifies as an "Application for Subdivision" which includes application forms, a fee schedule, and regulations Town officials provided to her that relate to a planned subdivision of property; the term "subdivision" in these documents appears to include a "lot line change." Plaintiff's reply affidavit also includes more elaborate and complete assertions as to what she was told by Greenburgh town officials. For instance, plaintiff asserts that Steve Fraietta, Greenburgh Building Inspector, informed her that the sale of the driveway easement and the driveway encroachment, would automatically void any and all variances previously granted in 1963, when

the house was built, and said that plaintiff's property must first come into compliance with current Town zoning regulations for an R-10 lot prior to the Town's approval of any reductions below the minimum lot size of 10,000 square feet, and that all previously-granted variances must be reapplied for. Plaintiff also asserts in her affidavit that in all of her conversations and meetings with town officials, their unanimous advice to her was that, even after incurring significant costs and considerable time, it was highly improbable that the Town would approve the further reduction of the plaintiff's lot size.

Of course, since this information was provided in the reply on the cross-motion, defendant did not have the opportunity to respond to it.

Discussion

As a general rule, absent a showing of cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, a stipulation made in open court by plaintiff's attorney is binding upon the plaintiff (*see Hallock v State of New York*, 64 NY2d 224 [1984]; *Davis v New York City Housing Auth.*, 300 AD2d 531 [2d Dept 2002]). The mistake required to vacate a stipulation of settlement is a mutual mistake which is so substantial that there is no true meeting of the parties' minds (*see Matter of Gould v Board of Educ.*, 81 NY2d 446 [1993]; *Malon v New York City Health & Hosps. Corp.*, 303 AD2d 725 [2d Dept 2003]).

The terms and recitations of the stipulation recognized that the Town might impose requirements as prerequisites to the contemplated sale, and contained an explicit agreement to comply with those requirements and “work with” the Town. Specifically, the on-the-record stipulation includes plaintiff’s agreement to statements that “before we sell the property of the driveway easement and the driveway encroachment, [plaintiff] will be willing to cooperate with the defendants with their landscaper, with their title company, with anything that they need so we

can sell the property," and that plaintiff "would be willing to work with the Town of Greenburgh, and if . . . defendants, your neighbors needed any work or any help, we won't stand in their way." Counsel for plaintiff also declared that

> "all parties will be willing to cooperate with the Town of Greenburgh, with the surveyor . . . and obviously with each other, because we have to sell this, so we will have to get potentially a schedule A, file, sign a contract, file the appropriate paperwork with the county, and also have to figure out certain documentations and time frames with regard to the Town of Greenburgh. So all parties agree to work with each other."

The mere need to apply for a variance does not in itself establish grounds to set aside the stipulation of settlement, and accordingly, plaintiff's refusal to do so, in the absence of any more substantive explanation, is a violation of the terms of the stipulation. Defendant's moving papers therefore establish a prima facie right to an order directing enforcement of the stipulation.

Plaintiff's initial submissions on her cross-motion, including her moving affidavit and the Schmidt email submitted as an exhibit, do not establish a mutual mistake of fact. They merely establish the need to apply for a variance, without any indication that the Town's requirements were onerous or burdensome. To the extent plaintiff's moving affidavit claims that she had been told that the that the sale of the driveway easement and encroachment would "automatically void any and all variances previously granted when the house was built in 1963," her assertion is merely hearsay on which this Court could not rely as a basis for setting aside the stipulation. Plaintiff's initial submissions contained nothing establishing the extent of the required submissions to apply for a variance, the fees that the Town would require for the application, or the administrative process the application could entail. Notably, it may be inferred from the terms of the stipulation of settlement that the parties contemplated that Town approval could be obtained in time to conduct a closing of the sale within sixty days.

It was not until plaintiff's reply to the cross-motion that she first provided specifics tending to establish the possibility that the parties may have made a substantial mutual mistake regarding the amount of time, effort and expense that would be required to obtain the Town's approval for the sale, amounts far beyond those contemplated at the time of the stipulation. If plaintiff's reply submissions accurately reflect applicable pre-requisites for the sale of the driveway easement and encroachment to defendant, the complicated forms calling for professional expertise, the possible assessment of fees totaling many thousands of dollars, and the need to invest significant time, could establish grounds for setting aside the stipulation based on mutual mistake.

However, evidentiary documents that are submitted for the first time in reply papers should be disregarded (*see Juseinoski v Board of Educ.*, 15 AD3d 353 [2d Dept 2005]). This rule is particularly applicable here, because defendant has the right to be heard on the question of whether a mutual mistake of fact was made at the time the parties entered into the stipulation; he did not have the opportunity to do so here. On the other hand, it does not serve either party for this Court to completely ignore the information belatedly submitted.

Based on the submissions before this Court, it is hereby

ORDERED that defendant's motion is granted to the extent that within sixty days of the filing of this order, the parties or their attorneys are directed to arrange and attend a joint meeting, either in person or with the use of remote conference procedures, with an appropriate Town official, to assess the exact nature and extent of the prerequisites for Town approval of the contemplated variance and sale, and unless those procedures are so onerous as to amount to an uncontemplated and unreasonable burden, plaintiff is directed to comply therewith; and it is further

ORDERED that plaintiff's cross-motion is denied, with leave to renew within thirty days after compliance with the foregoing directive, if the Town's required procedures are so onerous as to amount to an uncontemplated and unreasonable burden on plaintiff.

This Constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 6, 2020

HON. TERRY JANE RUDERMAN, J.S.C.