Fifty E. Forty Second Co. LLC v Grand Cent. Physical Medicine & Rehabilitation P.C.
2022 NY Slip Op 34192(U)
December 9, 2022
Supreme Court, New York County
Docket Number: Index No. 159862/2020
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART 58**

Justice

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INDEX NO. 159862/2020

FIFTY EAST FORTY SECOND COMPANY LLC,

Plaintiff,

MOTION SEQ. NO. 003

- v -

GRAND CENTRAL PHYSICAL MEDICINE & REHABILITATION P.C.,

Defendant.

DECISION AND ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 50, 51, 52, 53

were read on this motion to/for MISCELLANEOUS.

In this landlord/tenant action, plaintiff Fifty East Forty Second Company LLC moves to reform and modify paragraph 8 of a stipulation of settlement dated August 24, 2021. Defendant Grand Central Physical Medicine & Rehabilitation P.C. opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action (Action No. 1) stems from an alleged breach of a written lease (the Lease) by defendant, the commercial tenant for Suite 1200 (the Premises) in a building owned by plaintiff located at 315 Madison Avenue, also known as 50 East 42nd Street, New York, New York. Plaintiff commenced this action against defendant on November 15, 2020 by filing a summons and complaint to recover unpaid rent and additional rent from August 2020 through November 2020 in the sum of $67,544.66, plus attorneys' fees of not less than $10,000 (NY St Cts Elec

Filing [NYSCEF] Doc No. 1, complaint ¶¶ 23 and 31). By decision and order dated May 7, 2021, this Court granted plaintiff's motion for a default judgment and directed the Clerk of the Court to enter judgment against defendant in the sum of $67,978.41 plus prejudgment interest from August 6, 2020 (NYSCEF Doc No. 19). On June 1, 2021, the Clerk entered a judgment for plaintiff against defendant in the amount of $73,595.19 (NYSCEF Doc No. 24).

The next day, June 2, 2021, plaintiff commenced a separate action captioned *Fifty East Forty Second Co. LLC v Grand Cent. Physical Medicine & Rehabilitation P.C., et ano.*, Sup Ct, NY County, Index No. 155324/2021 (Action No. 2) against defendant and nonparty William J. Gibbs, Jr. (Gibbs), the guarantor on the Lease, seeking to recover rent from December 2020 through April 30, 2021, the date defendant allegedly vacated and abandoned the Premises, and all rent due for the remainder of the Lease term (NYSCEF Doc No. 1, complaint, in Action No. 2). Plaintiff seeks a money judgment of $1,913,226.86 against defendant, a money judgment of $1,831,171.80 against Gibbs, and an award of not less than $10,000 for its legal fees (*id.*). Defendant and Gibbs have served and filed an answer in Action No. 2 (NYSCEF Doc No. 5, answer, in Action No. 2).

On August 24, 2021, plaintiff and defendant executed a stipulation of settlement (the Stipulation of Settlement) settling Action No. 1, with defendant agreeing to pay plaintiff a settlement sum in installments by a date certain (NYSCEF Doc No. 43, David B. Rosenbaum [Rosenbaum] affirmation, Ex A at 1-2). Relevant to this motion is paragraph 8 of the Stipulation of Settlement, which reads:

> "This execution of this Stipulation of Settlement shall constitute a mutual general release between the parties, EXCEPT as to the obligations as set forth in this Stipulation of Settlement or any of Defendant's obligations in connection with claims for indemnification and contribution arising from non-party claims for

> personal injury, property damage and/or wrongful death occurring at the Premises while Defendant occupied the Premises"

(*id.* at 3) (extra spacing in original removed).

Additionally, paragraph 14 of the Stipulation of Settlement provides as follows:

> "This Agreement supersedes any and all prior Agreements, representations o [sic] understandings (whether oral or written) between the parties concerning the Premises, Lease and Guaranty, and represents the entire, complete and fully-integrated understanding and agreement with respect to the subject matter hereof, and can only be amended, supplemented or changed by written document signed by all of the parties hereto"

(*id.* at 4) (extra spacing in original removed).

After Action No. 1 was marked disposed, plaintiff, defendant and Gibbs continued to litigate Action No. 2, with plaintiff filing a motion for summary judgment on September 23, 2021 (NYSCEF Doc No. 6, notice of motion, in Action No. 2), and defendant and Gibbs moving, by order to show cause, to vacate their default in opposing plaintiff's motion (NYSCEF Doc No. 19, proposed order to show cause, in Action No. 2). By so-ordered stipulation dated October 25, 2021, defendant and Gibbs agreed to withdraw their proposed order to show cause, and the parties agreed to restore the motion for summary judgment to the motion calendar and set a briefing schedule (NYSCEF Doc No. 23, stipulation, in Action No. 2). In opposing the motion for summary judgment, defendant and Gibbs argued that the mutual release language in paragraph 8 in the Stipulation of Settlement "explicitly released Defendants from their obligations under the Lease and Guaranty" (NYSCEF Doc No. 24, Ernest Wilson [Wilson] affirmation, ¶ 15, in Action No. 2). On November 18, 2021, plaintiff filed a notice withdrawing its motion without prejudice (NYSCEF Doc No. 34, notice, in Action No. 2). Action No. 2 remains active.

Plaintiff now moves to reform the Stipulation of Settlement based on mutual mistake, arguing that the parties did not intend to settle or resolve Action No. 2, as evidenced by their conduct in continuing to litigate that action. In support of the motion, plaintiff's counsel submits an affirmation describing his negotiations with defendant's counsel.

Defendant argues that on August 23, 2021, plaintiff's counsel and defendant's counsel orally agreed to settle Action No. 1 and that this agreement was reduced to writing (NYSCEF Doc No. 47, Wilson affirmation, ¶¶ 12 and 17). Gibbs avers in an affidavit that it was his understanding the Stipulation of Settlement "resolved all outstanding issues pertaining to my lease agreement with the Plaintiff" and that paragraphs 8 and 14 "reflected exactly what my attorney and I had discussed" (NYSCEF Doc No. 47, Gibbs aff, ¶¶ 4-5).

LEGAL CONCLUSIONS

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Because a stipulation is a contract, it must be construed under the principles generally applicable to contract interpretation (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]). Thus, "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*, 64 NY2d at 230). While a unilateral mistake is an insufficient basis to reform a written agreement (*Rotter v Ripka*, 110 AD3d 603, 604 [1st Dept 2013]), reformation is available based upon a mutual mistake (*see 313-315 W. 125th St. L.L.C. v Arch Specialty Ins. Co.*, 138 AD3d 601, 602 [1st Dept 2016]). This is so even where the written agreement is not ambiguous (*Leacock v Leacock*, 132 AD3d 818, 819 [2d Dept 2015]). A "[m]utual mistake occurs when a signed writing does not accurately express the agreement of the parties" (*K.I.D.E. Assoc. v Garage Estates Co.*, 280 AD2d 251, 253 [1st Dept 2001]). Where a

claim of mutual mistake is made, parol or extrinsic evidence of the parties' agreement may be used to overcome the "'heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties'" (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986], quoting *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]; *313-315 W. 125th St. L.L.C.*, 138 AD3d at 602 [stating that clear and convincing evidence is required]). Thus, "[f]or a party to be entitled to reformation on the ground of mutual mistake, the mistake must be material, and the party must 'demonstrate that the mistake existed at the time the stipulation was entered into and that it was so substantial that the stipulation failed to represent a true meeting of the parties' minds'" (*Yakobowicz v Yakobowicz*, 142 AD3d 996, 998 [2d Dept 2016] [citations omitted]).

Here, plaintiff has demonstrated that the mistake, namely the failure to exempt Action No. 2 from the mutual release language in the Stipulation of Settlement, is material and warrants reformation. Plaintiff's counsel, who has personal knowledge of the underlying negotiations, affirms that defendant's counsel contacted him in a "panic to settle" Action No. 1 but "only after the city marshal took action to attach his clients' accounts" (NYSCEF Doc No. 42, Rosenbaum affirmation, ¶ 8). Plaintiff's counsel further affirms that when he "suggested we settle both actions … [plaintiff's counsel] said to settle the urgent action first and then we could deal with the second action" (*id.*).

A review of the Stipulation of Settlement reveals that it does not refer to Action No. 2, which supports plaintiff's argument. The first "whereas" clause refers only to the "judgment … of $73,595.19 … entered in this action on June 1, 2021 … against Defendant" (NYSCEF Doc No. 43 at 1). Although the Stipulation of Settlement does not define the term "defendant", it evidently refers to "Grand Central Physical Medicine & Rehabilitation, P.C.," the only entity

against which a judgment was entered. No mention is made of Gibbs, the codefendant in Action No. 2, and it does not appear that defendant's counsel represented Gibbs as a named defendant for purposes of executing the Stipulation of Settlement[1] (*id.* at 4). Second, Paragraph 7 provides that, upon full payment of the settlement sum, plaintiff would file a satisfaction of judgment in Action No. 1 only (*id.* at 2-3).

Plaintiff has also shown that the parties' subsequent actions after executing the Stipulation of Settlement are inconsistent with their understanding that plaintiff had released its claims in Action No. 2 (*see Asset Mgt. & Capital Co., Inc. v Nugent*, 85 AD3d 947, 948 [2d Dept 2011] [reforming a stipulation of settlement for mutual mistake based, in part, on the defendant's conduct in the litigation]; *Collins v Peckham Rd. Corp.*, 18 AD2d 860, 861 [3d Dept 1963] [allowing reformation of a contract where the plaintiff's course of conduct was contrary to its understanding of its contract obligations]). In this instance, plaintiff moved for summary judgment in Action No. 2 less than one month after signing the Stipulation of Settlement. And, in its proposed order to show cause filed in Action No. 2, defendant sought to vacate its default in failing to oppose plaintiff's summary judgment motion and to oppose the motion on the merits. Defendant never mentioned either the Stipulation of Settlement, which had been executed just two months earlier, or the purported release of all claims in Action No. 2. Instead, defendant argued that its attorney had negotiated a surrender of the Premises, and that questions of fact exist or that equitable estoppel applied concerning a Lease provision prohibiting oral modifications (NYSCEF Doc No. 20, Wilson affirmation, ¶ 10, in Action No. 2). Such behavior indicates that there was no meeting of the minds as to whether plaintiff had released defendant

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[1] The signature line on the Stipulation of Settlement mistakenly refers to "Ernest Wilson, Attorney at Law" as the attorneys for plaintiff and the law firm representing plaintiff as the attorneys for defendant (NYSCEF Doc No. 43 at 4).

from all claims (*see 6115 Niagara Falls Blvd. v Calamar Constr. Mgt., Inc.*, 193 AD3d 1436 [4th Dept 2021] [no meeting of the minds on whether a $97,000 credit applied to a $150,000 settlement sum]).

In response, defendant does not dispute that its attorney contacted plaintiff's counsel for the sole purpose settling Action No. 1. Defendant's counsel affirms that he and plaintiff's counsel "discussed and mutually agreed [to] … the terms and conditions of the parties' written settlement of Action 1" and that the "parties' oral agreement to settle Action 1 was reduced to writing by the attorney for plaintiff" (NYSCEF Doc No. 47, Wilson affirmation, ¶ 12) (emphasis removed). Nowhere in his affirmation does defendant's counsel represent that the parties' oral agreement included a mutual release of plaintiff's claims in Action No. 2, despite the fact that defendant produced an email from plaintiff's counsel in which the latter wrote that "the stip is inline [sic] with what we spoke about" (NYSCEF Doc No. 48, Wilson affirmation, Ex A at 1). Gibbs' understanding of the Settlement of Stipulation is derived from a conversation he had with his attorney, which does not establish the terms of any agreement between his attorney and plaintiff's counsel. Further, this Court notes that, in his affidavit, Gibbs inserted himself as a defendant in the caption for Action No. 1 although he was not named as a defendant in the summons or complaint in that action (NYSCEF Doc No. 1).

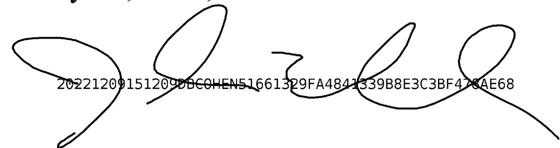
Given the parties' conflicting representations regarding the terms of their agreement, this matter is set down for a hearing to determine the issue of whether the inclusion of mutual release language in paragraph 8, without exempting plaintiff's claims in Action No. 2, was the result of a mutual mistake (*see Montero v Montero*, 85 AD3d 986, 987 [2d Dept 2011], *lv dismissed, lv denied* 18 NY3d 878 [2012] [decision rendered after a hearing to reform a stipulation of settlement to conform to the parties' intent]; *K.I.D.E. Assoc. v Garage Estates Co.*, 280 AD2d

251, *supra* [issue of whether lease should be reformed referred to J.H.O. for resolution]; *Tai Wing Hong Importers v King Realty Corp*., 208 AD2d 710, 711 [2d Dept 1994] [hearing resolved whether inclusion of a provision in a lease agreement obligating the plaintiff to make mortgage payments was the result of a mutual mistake]; *Brender v Brender*, 199 AD2d 665, 666 [3d Dept 1993] [directing a hearing to reform a stipulation of settlement based on the parties' conflicting proof]).

Accordingly, it is hereby:

ORDERED that this matter is set down for a hearing regarding whether the inclusion of mutual release language in paragraph 8 of the parties' stipulation of settlement dated August 24, 2021, without exempting the claims brought by plaintiff Fifty East Forty Second Company LLC in a separate action captioned *Fifty East Forty Second Co. LLC v Grand Cent. Physical Medicine & Rehabilitation P.C., et ano*., Sup Ct, NY County, Index No. 155324/2021, is the result of a mutual mistake; and it is further

ORDERED that counsel for the parties are directed to appear for the hearing at 71 Thomas Street, Room 305, New York, New York on January 25, 2023, at 9:30 a.m.



12/9/2022	DAVID B. COHEN, J.S.C.
DATE	

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	