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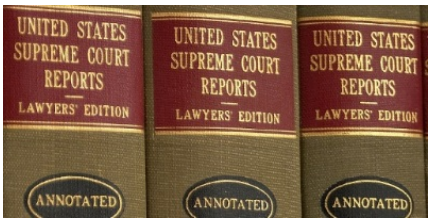

SETTLEMENTS THAT STICK

Drafting Settlement Agreements that Withstand the Test of Time

FACULTY

Joanne Fanizza, Esq.

December 8, 2021
Suffolk County Bar Association, New York

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JOANNE FANIZZA, ESQ.

Joanne Fanizza is licensed to practice law in Florida, New York and the District of Columbia. Her earliest bar admission was in Florida in 1988, where she began practicing plaintiff's personal injury litigation and media law in association with a boutique PI firm in Fort Lauderdale headed by the then-president of The Florida Bar.

Joanne then started her own practice in 1995, where she transitioned her practice to estate planning and administration, real estate, small business and civil litigation. In 2007, Joanne moved back to Long Island, her roots, then opened an office on Long Island. She maintains an office in Fort Lauderdale; however, the Melville office is her primary office. She visits and works out of the Fort Lauderdale office several times a year (in non-pandemic years).

Joanne has a Bachelor's Degree in Political Science (with a sub-specialty in Sovietology) from the University of Florida (June 1981), and a Juris Doctor degree from the University of Florida College of Law (December 1987). She was admitted to The Florida Bar in 1988, the District of Columbia Bar in 2006, and the New York Bar in 2007. She is also admitted to practice in various federal courts, including the U.S. District Courts for the Southern and Middle Districts of Florida and the Eastern District of New York. She is admitted to the 11th U.S. Circuit Court of Appeals, and has appeared before the 2nd U.S. Circuit Court of Appeals in New York *pro hac vice*. She is also admitted to practice before the U.S. Supreme Court and has filed one jurisdictional brief in the high court.

Joanne taught Florida probate administration in New York to dual-admitted lawyers such as herself on behalf of The Florida Bar in November 2019, with our beloved colleague Bruce Steiner, who is also dual-admitted. That CLE presented many of the same issues we will be discussing today.

Joanne has written extensively on various estate planning and administration matters, including an article published in the New York State Bar Association's Elder Law and Special Needs Journal in Winter 2016 ("Should They Go or Should They Stay? Issue-Spotting for the New York Lawyer Whose Clients May be Considering a Change in Domicile to Florida"). In addition, she has published articles entitled "Seniors, You Can Maintain Control After Control Slips Away with the Right Plan",

"The ABC's of Medicaid For the Elderly", "Should You Trust the Living Trust?" and "Busting the Biggest Medicaid Myth -- Transferring Assets", to name a few.

She has been quoted by the New York Times, Fox Business online, Forbes and Retire Life, on topics such as the risks in avoiding probate, "budget" estate planning, advanced directives and other topics of interest to Seniors. She has also been a Guest Speaker on topics pertaining to her practice for the Nassau County Bar Association, and other organizations both in New York and Florida. She is listed in *Who's Who in America*, *Who's Who in the South and Southwest*, *Who's Who of American Women* and *Who's Who in American Law.*

Joanne is a member of the American Bar Association, the New York State Bar Association, the Federal Bar Association, the Broward County Bar Association, the Nassau County Bar Association and the Suffolk County Bar Association. She has received numerous *pro bono* awards, including being named the Broward County Volunteer Lawyer of the Year, and received The Florida Bar President's Pro Bono Service Award in 2005. She also was named Pro Bono Lawyer of the Month by the Nassau County Bar Association in December 2015, and continues to serve in NCBA's Pro Bono Law Clinic.

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SETTLEMENTS THAT STICK:
Drafting Settlement Agreements That Withstand the Test of Time (i.e., Breach and Motion and Appeal)

By Joanne Fanizza, Esq.
Law Offices of Joanne Fanizza, P.A.
Melville, New York, and Fort Lauderdale, Florida
Of Counsel
Bruno, Gerbino, Soriano & Aitken, LLP
Melville, New York

Congratulations, you've settled your case! After all that hard work and litigation, you've finally come to an agreement to resolve your client's dispute with the other side. You've committed the terms to paper, your client is relatively happy (considering no party is ever completely thrilled with a settlement) and all is good in the world – or is it? After signing off, the opposing party later decides they don't want to play nice in the sandbox any more and they aren't going to honor the contract they signed.

Can you compel them to abide by what they signed? If you've crafted the settlement agreement correctly, you certainly can. This course is designed to give you the information you need to lock in your settlement agreement and hold the opposing side to it. It is appropriate for all civil litigators who toil under the CPLR, including the Supreme Court or Surrogate's Court, and focuses on the CPLR and case law interpreting same.

I. The Settlement Agreement

Let's start by defining a settlement agreement, which is usually called a Stipulation of Settlement. CPLR Section 2104 governs stipulations and states:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party

> unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Thus, a stipulation of settlement can be made in open court or it can be reduced to a writing and filed with the clerk of the court where your case is located. It can be an agreement signed by the parties and/or their counsel, or it can be an order entered by the judge.

The elements are:

A. An agreement by the parties or their attorneys. A party does not have to be present so long as their attorney is acting on their behalf.

B. The agreement can be made in open court – on the record.

C. The agreement can be made in a writing and submitted to the court or clerk for entry on the record in the case file.

D. If reduced to a writing, it should be signed by all parties and their counsel. It does not have to be countersigned or so-ordered by the judge in order to be effective.

Practice tip: Once reduced to writing, you should try to have it "So Ordered" by the judge to constitute an order enforceable by contempt. However, if your judge somehow fails to so-order it, it will still be effective so long as all parties and/or their attorneys sign it and you file it with the clerk of your court.

II. Public Policy on Settlement Agreements

How do the courts view stipulations of settlement? The public policy of the State of New York is:

A. "Stipulations of settlement are favored by the courts and not lightly cast aside." *Hallock v. State,* 64 N.Y.2d 224 (1984) This is this state's seminal case involving the treatment of stipulations of settlement by counsel.

B. This policy is all the more compelling "in the case of 'open court' stipulations". *Id.* at 230.

C. Upholding settlements agreements meets the courts' public policy of dispute resolution, management of court calendars and integrity in litigation. *Id.*

D. Stipulations of settlement that put an end to litigation "promote efficient dispute resolution and are essential to the litigation process." *Matter of Siegel,* 5 Misc.3d 1017[A], 799 N.Y.S.2d 164, 2004 NY Slip Op. 51414[U] (Surr.Ct. Nassau Co. 2004), *affirmed,* 29 A.D.3d 914, 814 N.Y.S.2d 548 (2nd Dept. 2006).

E. They are especially favored when the parties have been represented by counsel. *Matter of Stark,* 233 A.D.2d 450, 650 N.Y.S.2d 608 (2nd Dept. 1996).

Cautionary note: One of the *Hallock* parties who was present in the courtroom while his attorney entered the stipulation on his behalf tried to have it set aside two months later. The court was unpersuaded, but noted that the client's relief, if any, was not in setting aside the stipulation but rather against his attorney for any damages his attorney's conduct purportedly caused him – assuming the attorney was acting without the client's authority.

Practice tip: If you're concerned about your client's future conduct regarding the settlement, have them acknowledge to the court on the record that they agree to the settlement. If not in open

court, then have the client sign the stipulation along with you.

III. Reasons to Set Aside a Stipulation

A party *can* be relieved on the consequences of a settlement agreement if:

A. The attorney/agent acted without authority:

1. Because attorneys have authority to manage litigation on behalf of clients, including authority to make procedural or tactical decisions, attend pretrial conferences designed to settle the case, etc., this is a high bar. *Hallock, id.*

2. However, it is not insurmountable. An attorney cannot compromise or settle a case without a grant of authority from the client or it will not be binding. *Hallock, id.,* and cases cited within.

3. If there is a question about the attorney's authority, the matter is appropriate for an evidentiary hearing. *Suslow v. Rush,* 554 N.Y.S.2d 620, 161 A.D. 2d 235 (1st Dept. 1990)

B. Fraud

1. The elements consist of misrepresentation, known by defendant to be false and made for the purpose of having the opposing side rely upon it, the opposing side's justifiable reliance upon the fraud, and damages. *Kuncman v. American Porfolios Financies Services, Inc.*, 25 Misc.3d 1218[A], 901 NYS2d 907 (Sup. Ct. Nassau Co. 2009) (citing multitude of cases)

C. Collusion (not a lot of case law in this area, but the following statute and case

address it):

1. Judiciary Law § 487: an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is guilty of a misdemeanor, as well as treble damages to the injured party in a civil action.

2. The Judiciary Law creates a separate cause of action against the attorney in two circumstances: the attorney must have engaged in behavior intended to deceive a party in a pending judicial proceeding or where the deception is directed against a court and it relates to either a prior judicial proceeding or one that may be commenced in the future. *Kallista S.A. v. White & William, LLP,* 27 N.Y.S.3d 332, 51 Misc.3d 401, 2016 N.Y. Slip Op. 26009 (Sup. Ct. Westchester Co. 2016)

D. Mistake or accident:

1. For a claim of **unilateral mistake**, enforcement must be unconscionable, the mistake is material and made despite the exercising of ordinary care bythe party in error, the innocent party had no knowledge of the error, and it is possible to place the parties in status quo. *Matter of Siegel, id.* (citing cases) Not negligence, ignorance of a condition or information the party knew or should have known by exercising ordinary care. *Siegel; Matter of Abu-Regiaba, id*. (see cases cited within). Negligence is a bar to rescission. *Da Silva*

v. Musso, 53 NY2d 543, 428 NE2d 382; 444 NYS2d 50 (1981)

2. **Mutual mistake** has to be substantial and result in an absence of the requisite "meeting of the minds" before it will be voidable and subject to rescission. *Matter of Abu-Regiaba, id.* Relief on this basis is only appropriate "in exceptional situations", where the mistake of both parties upsets the very basis for the contract as to have a material effect on the agreed exchange of performances. *Da Silva v. Musso,* 53 N.Y.2d 543, 428 N.E.2d 382; 444 N.Y.S.2d 50 (1981)

3. **Burden of proof**: The party seeking to vacate on this basis must overcome a heavy presumption and establish their position by clear and convincing evidence. *Matter of Siegel, id*.

E. Unjust enrichment. *Weissman v. Bondy & Schloss,* 230 A.D.2d 465, 660 N.Y.S.2d 115 (1st Dept. 1997)

Essentially, basic contract law. And a high bar to reach. Those contentions have difficult standards of proof.

IV. How to Make Your Settlement Stick

At the outset, the best way to have an enforceable settlement is to draft it with **very clear terms**. Usually settlements require parties to do certain things to resolve the legal problems between or among them. In certain types of cases, the burden of performance may be on both parties – and the parties may give each other deadlines to accomplish those actions. Make performance terms clear and, unless you intend to void the settlement agreement if one of the sides refuses to comply, **make it additionally clear that a failure of either side to perform a certain task by a certain date does**

not void out the agreement or rescind it, but rather makes it subject to specific performance, along with the rest of the agreement.

A. There is a long line of case law that states that damages provisions in contracts, whether liquidated (e.g., in real estate contracts) or similar, do not bar specific performance (equitable relief) unless the agreement specifically states that is to be the sole remedy. *Rubenstein v. Rubenstein,* 23 N.Y.2d 293, 244 N.E.2d 49, 296 N.Y.S.2d 354 (1968) (and cases cited therein, dating back to the 1880s).

B. Settlements are intended to ***settle cases***, not put the parties back to Square One. "...[T]he law presumes that the primary purposes of a contract, not expressly stated to be an option, is performance of the act promised and not nonperformance," *Rubenstein,* 244 N.E.2d at 52. "Penalty clauses and even liquidated damages clauses are generally inserts to help secure performance and to avoid litigation as to quantum of damages. In this way, it is hoped to induce performance by making delay or breaches unprofitable." *Id.* at 53.

C. Settlement agreements that do not explicitly state that remedies are sole or exclusive will be upheld in their entirety. *In the Matter of the Varone Irrevocable Trust, et al.,* 195 AD3d 728, 145 N.Y.S.3d 397, (2nd Dept. March 23, 2021) (and cases cited therein). Courts construing these agreements should "give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized. *Varone, id.,* (citing other cases).

V. When All Else Fails

Despite your best attempts at persuasion, the opposing side may simply refuse to comply – and take their chances. Your job now is to prepare and file a Motion to Enforce or Compel Compliance With Stipulation of Settlement. Look at the long history of contract law in the State of New York to support your position. The cases cited in this outline cite within them a long history of case law on these issues and provide a wealth of information and authority to support your client's position – back to the 1880s!

If you lose at the trial court level, don't despair – be prepared to appeal to the Appellate Division. Your client deserves nothing less!

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SUFFOLK ACADEMY OF LAW

Wednesday, December 8, 2021

By Joanne Fanizza, Esq.
Law Offices of Joanne Fanizza, P.A.
Melville, New York, and Fort Lauderdale, Florida
Of Counsel
Bruno, Gerbino, Soriano & Airken, LLP
Melville, New York

SUFFOLK ACADEMY OF LAW
December 8, 2021

JOANNE FANIZZA is admitted to the New York (2007), Florida (1988) and District of Columbia Bars (2006). She has a Bachelor's Degree in Political Science from the University of Florida (1981) and was a newspaper reporter and editor from 1977-1986. She then returned to school to pursue a juris doctor degree at the University of Florida Levin College of Law, from which she graduated in December 1987.

Joanne associated with the Ferrero, Middlebrooks, Strickland & Fischer, P.A., law firm, where she practiced high-end plaintiff's side litigation (products liability, medical and professional malpractice, mega-torts) and media law, repesenting her former employer, the *South Florida Sun-Sentinel* newspaper, in all aspects of its business practices, from First Amendment work to the business side. Her first jury trial, in a products liability case (motorcycle crashworthiness) in federal court in Biloxi, Mississippi, resulted in a $3 million verdict for the firm's plaintiff-client.

After leaving the firm, Joanne established her current law firm and expanded her practice areas to include estate planning and administration, real estate, litigation, and commercial and small business law. She also handles the appeals of her cases. She continued to litigate in the Florida courts in a wide variety of cases until she returned to her home state of New York in 2007. She actively practices in both states from her offices in Melville and Fort Lauderdale. She became of counsel to Bruno, Gerbino, Soriano & Aitken, LLP, an insurance defense litigation firm, in October 2020.

Several of Joanne's law cases have resulted in published opinions in Florida and New York. Most recently she won appeals involving the enforcement of settlement agreements in the New York Supreme Court, First Department Appellate Division, *Estate of Hernesh* 154 AD3d 633 (1st Dept. 2017), and Second Department Appellate Division, *In the Matter of the Varone Irrevocable Trust,* 195 AD3d 728 (2nd Dept. 2021).

Joanne holds a Judiciary Preeminent AV rating by Martindale-Hubbell. She is a member of the Suffolk and Nassau County Bar Associations, the Broward County (FL) Bar Association, the New York State Bar Association (Elder Law and Special Needs, General Practice and Trusts and Estates Law Sections), the American Bar Association (Real Property, Trust & Estates Law Section), and The Florida Bar's Real Property, Probate, Trust and Estate Law Section.

Settlements That Stick:
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That Withstand the Test of Time

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The Elements:

The elements of a Stipulation of Settlement are:

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C. The agreement can be made in a writing and submitted to the court or clerk for entry on the record in the case file.

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C. Upholding settlements agreements meets the courts' public policy of dispute resolution, management of court calendars and integrity in litigation. *Id.*

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How to make them stick (cont'd.)

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###

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 21. Papers

McKinney's CPLR Rule 2104

Rule 2104. Stipulations

Effective: July 14, 2003
Currentness

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Credits
(L.1962, c. 308. Amended L.2003, c. 62, § 28, eff. July 14, 2003.)

McKinney's CPLR Rule 2104, NY CPLR Rule 2104
Current through L.2017, chapters 1 to 331.

End of Document

Hallock v. State

Court of Appeals of New York

November 14, 1984, Argued ; December 27, 1984, Decided

No. 605

Reporter
64 N.Y.2d 224; 474 N.E.2d 1178; 485 N.Y.S.2d 510; 1984 N.Y. LEXIS 4906

Carlton G. Hallock et al., Respondents, v. State of New York et al., Defendants, and Power Authority of State of New York, Appellant

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 29, 1983, which (1) reversed, on the law and the facts, a judgment of the Supreme Court, entered in Schoharie County, upon a decision of the court at a Trial Term (Leonard Weiss, J.), (a) adjudging that the stipulation of settlement entered into on April 22, 1975 between plaintiffs and defendants, the Power Authority of the State of New York and the State of New York, be specifically performed, and (b) directing plaintiffs to execute releases and stipulations in the form required by the Power Authority of the State of New York and by the Attorney-General's office, (2) vacated the stipulation of settlement, and (3) restored the actions of plaintiffs in the Supreme Court and Court of Claims to their respective calendars.

Plaintiffs, Carlton Hallock and Seeley Phillips, in 1968 purchased a tract of land in Schoharie County, about two miles from the proposed site of a dam to be built by the Power Authority of the State of New York (PASNY). Plaintiffs intended to sell sand and gravel from their land to PASNY for use in construction of the dam, but the State, on behalf of PASNY, in 1969 appropriated the entire tract in fee. Plaintiffs filed a claim for damages in the Court of Claims and commenced a declaratory judgment action in Supreme Court against defendants, PASNY and the State, to challenge their legal right to take by eminent domain a full fee interest rather than simply an easement. Trial was to begin on April 22, 1975, preceded by a pretrial conference that morning. Court rules required that attorneys attending pretrial conferences have authority to enter into binding settlements on behalf of their clients (22 NYCRR 861.17). Plaintiffs were represented by Anthony Quartararo, who had served as their counsel throughout the five-year life of the litigation and had engaged in prior settlement discussions with defendants. Defendants had offered to settle by reconveying the land to plaintiffs and allowing them to keep the advance they had received, but plaintiffs advised Quartararo that they did not like that offer and wanted the matter to go before the Judge. Hallock was ill on April 22 and did not attend the pretrial conference. Phillips, however, was present with his attorney, Henry Whitbeck, who had represented plaintiffs in their acquisition of the land. After discussion, counsel entered into a stipulation of settlement whereby Quartararo, for plaintiffs, agreed to accept reconveyance of the land and retention of the advance. The terms of the agreement were dictated into the record. The Trial Judge asked the attorneys for each side separately if they agreed to the settlement, and obtained their assents. He then observed that according to court rules the settlement "finalized the case," and the case was removed from the Trial Calendar. Throughout these proceedings, Phillips remained silent, as did Whitbeck; Hallock learned of the settlement later that day. More than two months elapsed before plaintiffs voiced any objection. In mid-July 1975, Hallock expressed his dissatisfaction with the settlement, and plaintiffs thereafter moved to vacate the stipulation, relief which the trial court granted. The Appellate Division, however, ruled that a plenary action was required to set aside a stipulation of settlement (*58 AD2d 67*, app dsmd *43 NY2d 892*), and the present

lawsuit followed. After trial, the court directed specific performance of the settlement stipulation, finding that Phillips was bound by the stipulation in view of his presence at the conference, and that Hallock was also bound because he had conferred authority upon Quartararo to negotiate and settle the case and had ratified the settlement. The court concluded that good cause for relief from the stipulation had not been shown. A divided Appellate Division reversed, the three-Justice majority concluding that Quartararo had no authority to settle the case on the terms embodied in the stipulation, rendering the settlement a nullity, and restored plaintiffs' actions to their respective calendars. The dissenting Justice found Phillips foreclosed from challenging the settlement because of his silence during the pretrial conference, and Hallock bound because he had clothed Quartararo with apparent, if not actual, authority to settle the case.

The Court of Appeals reversed the order of the Appellate Division, and reinstated the judgment of Supreme Court, holding, in an opinion by Judge Kaye, that a stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.

Hallock v State of New York, 98 AD2d 856.

Disposition: Order reversed, etc.

Core Terms

settlement, apparent authority, bind, settle, pre trial conference, negotiate, attorneys

Case Summary

Procedural Posture
Plaintiff buyers purchased a tract of land about two miles from the proposed site of a dam to be built by defendant power authority. A dispute arose when the state appropriated the entire tract. A settlement was made in open court. More than two months elapsed before the buyers objected to the settlement. The settlement was put aside on appeal. The power authority then appealed the set aside of the settlement.

Overview
A pre-hearing conference was held. One of the buyers was ill and did not attend the pretrial conference, but his attorney did. The other buyer was present with his attorney. In open court, the parties entered into a stipulation of settlement whereby the non-attending buyer's attorney agreed to accept reconveyance of the land and retention of the advance. Throughout the proceedings, the other buyer and his attorney remained silent. Subsequently, the buyers filed a motion to vacate the stipulation, which the trial court granted. The appellate division ruled that a plenary action was required to set aside a stipulation of settlement, and the lawsuit followed. After trial, the court directed specific performance of the settlement stipulation. A divided appellate division reversed, concluding that the negotiating attorney had no authority to settle the case on the terms embodied in the stipulation, and restored buyers' actions to their respective calendars. On appeal, the court reversed, holding that a stipulation of settlement made by counsel in open court bound his clients, even where it exceeded his actual authority. The court reinstated the judgment of trial court.

Outcome
The court reversed the order of the appellate division and reinstated the judgment of trial court, holding that a stipulation of settlement made by counsel in open court bound his clients, even where it exceeded his actual authority.

LexisNexis® Headnotes

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1 A stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2 A plenary action is not always required to contest a stipulation of settlement.

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN3 Stipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of open court stipulations, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. 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.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Legal Ethics > Client Relations > General Overview

HN4 From the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical. But that authority is hardly unbounded. Equally rooted in the law is the principle that, without a grant of authority from the client, an attorney cannot compromise or settle a claim, and settlements negotiated by attorneys without authority from their clients have not been binding.

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Conduct of Parties

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Reliance

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Fraud & Misrepresentation

HN5 Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal, not the agent. Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable.

Headnotes/Syllabus

Headnotes

Stipulations -- Stipulation in Open Court -- Stipulation by Attorney Binding on Clients Where It Exceeds His Actual Authority -- Apparent Authority

1. A stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority. Thus, plaintiffs, one of whom was present and one absent during the final pretrial conference at which a stipulation of settlement was entered into by their attorney, must bear the responsibility for their attorney's conduct in accepting the settlement that they claim they had instructed him to reject. There was no showing of fraud, collusion, mistake or accident sufficient to relieve plaintiffs from the consequences of the stipulation made during litigation; therefore, plaintiffs must demonstrate that their attorney was without authority of any sort to enter into the settlement. Moreover, the plaintiff who was present

during negotiation of the settlement, and failed to voice an objection thereto, cannot be heard to challenge the settlement; he acquiesced in, consented to, and is bound by the settlement. The plaintiff who was not present at said pretrial conference is also bound by the settlement since, as a matter of law, he clothed his attorney with apparent authority to enter into the settlement. The attorney had represented plaintiffs throughout the litigation, engaged in prior settlement negotiations for them and, in furtherance of the authority which had been vested in him, appeared at the final pretrial conference, his presence there constituting an implied representation by the absent plaintiff to defendants that the attorney had authority to bind him to the settlement; in the circumstances it necessarily fell to the present plaintiff or the attorney himself to reveal any restrictions on the attorney's authority to settle, and absent such disclosure defendants' reliance on the appearance of authority was entirely reasonable.

Stipulations -- Stipulation in Open Court -- Apparent Authority -- Detrimental Reliance -- Discontinuance of Lengthy Litigation on Day of Trial

2. The discontinuance of lengthy litigation on the day of trial, in reliance on the adversary's settlement stipulation coupled with plaintiffs' silence for more than two months thereafter, is itself a change of position which constitutes detrimental reliance. Thus, if such a showing is indeed even required before the doctrine of apparent authority may be invoked, defendants may invoke the doctrine where plaintiffs' attorney, clothed with apparent authority, made a stipulation of settlement of the lawsuit between the parties on the day the trial was scheduled to begin, thereby halting the litigation that had been ongoing for five years, and plaintiffs did not object to the settlement until more than two months had elapsed from the time the stipulation of settlement was made. Additionally, to set aside this settlement stipulation invites destruction of the process of open-court settlements.

Counsel: *Charles M. Pratt, Stephen L. Baum* and *John Lamberski* for appellant. I. The court below erred in determining that respondents' attorney Quartararo did not have apparent authority. (*Greene v Hellman, 51 NY2d 197*; *International Telemeter Corp. v Teleprompter Corp., 592 F2d 49*; *Owens v Lombardi, 41 AD2d 438*; *Di Russo v Grant, 28 AD2d 847*; *Fox v Wiener Laces, 105 Misc 2d 672*; *Matter of L'Hommedieu v Board of Regents, 276 App Div 287*; *Lazarus v Bowery Sav. Bank, 16 NY2d 793*.) II. The court below erred in finding that Quartararo lacked actual authority to enter into the settlement. (*Greene v Hellman , 51 NY2d 197*; *Di Russo v Grant, 28 AD2d 847*; *Continental Cas. Co. v Chrysler Constr. Co., 80 Misc 2d 552*; *Martinez v 348 East 104 St. Corp., 60 Misc 2d 31*; *Matter of Hime Y., 54 NY2d 282*; *Spano v Perini Corp., 25 NY2d 11*.) III. The court below erred in failing to find that respondents ratified the settlement and are estopped to deny its validity. (*Rothschild v Title Guar. & Trust Co., 204 NY 458*; *Continental Cas. Co. v Chrysler Constr. Co., 80 Misc 2d 552*; *Boyd v Boyd, 252 NY 422*; *Electrolux Corp. v Val-Worth, Inc., 6 NY2d 556*; *Amend v Hurley, 293 NY 587*; *Spano v Perini Corp., 25 NY2d 11*.) IV. The court below erred in finding that respondents were prejudiced by the trial court's exclusion of portions of respondents' depositions. (*Tomaino v Tomaino, 68 AD2d 267*; *Amend v Hurley, 293 NY 587*.) V. The court below abused its discretion by reversing the trial court based upon a new fact which it incorrectly found and facts which the trial court found were not persuasive enough to warrant a different result. (*Matter of Frutiger, 29 NY2d 143*; *Campbell v Bussing, 274 App Div 893*; *Matter of Abramovich v Board of Educ., 46 NY2d 450, 444 U.S. 845*; *Tiffany v Town of Oyster Bay, 234 NY 15*; *Levey v Babb, 39 Misc 2d 648*.)

William J. Schoonmaker, Walter L. Bellcourt and *Linda S. Leary* for respondents. I. The court below did not err in determining that respondents' attorney Quartararo lacked authority to enter into the settlement. (*Countryman v Breen, 241 App Div 392*; *Stein v Mostoff, 34 AD2d 655*; *Silver v Parkdale Bake Shop, 8 AD2d 607*; *Ricketts v Pennsylvania R. Co., 153 F2d 757*; *Greene v Hellman, 51 NY2d 197*; *Walsh v Hartford Fire Ins. Co., 73 NY 5*; *Matter of Dugan, 147 Misc 776*; *Wen Kroy Realty Co. v Public Nat. Bank & Trust Co.,*

260 NY 84; Barrett v Third Ave. R. R. Co., 45 NY 628; Owens v Lombardi, 41 AD2d 438.) II. The trial court committed reversible error in refusing to allow respondents' attorney to read testimony given by Hallock and Phillips at examinations before trial after the Power Authority had first read parts of their testimony given at the same examination. (Leonard v Shayne, 21 AD2d 644; Nixon v Beacon Transp. Corp., 239 App Div 830; National Fire Ins. Co. v Shearman, 223 App Div 127; Gottfried v Gottfried, 197 Misc 562; Yeargans v Yeargans, 24 AD2d 280; Feldsberg v Nitschke, 66 AD2d 757, 49 NY2d 636.) III. The court below correctly found no ratification of the stipulation by plaintiffs and that they should not be estopped from denying its validity. IV. The alleged stipulation of settlement entered into on April 22, 1975 should be set aside in the interests of justice. (Manufacturers & Traders Trust Co. v Cottrell, 71 AD2d 538; Bussing v Caligiuri, 65 AD2d 764; Central Val. Concrete Corp. v Montgomery Ward & Co., 34 AD2d 860; Matter of Frutiger, 29 NY2d 143; Monasebian v Du Bois, 30 AD2d 839; Teitelbaum Holdings v Gold, 48 NY2d 51; Russo v Russo, 17 AD2d 129; Kay v Tankel, 16 AD2d 96; Matter of Shapiro, 14 AD2d 898; Bruder v Schwartz, 260 App Div 1048.) V. The purported stipulation of settlement was not a final disposition of the case. (67 Wall St. Co. v Franklin Nat. Bank, 37 NY2d 245; Tougher Heating & Plumbing Co. v State of New York, 73 AD2d 732; Mazzella v American Home Constr. Co., 12 AD2d 910; Central Val. Concrete Corp. v Montgomery Ward & Co., 34 AD2d 860; Monasebian v Du Bois, 30 AD2d 839; Horodeckyi v Horodniak , 9 AD2d 732.) VI. Appellant's point V is untenable.

Judges: Kaye, J. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Opinion by: KAYE

Opinion

[*228] [1179] [***511] OPINION OF THE COURT**

HN1 A stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.

Plaintiffs, Carlton Hallock and Seeley Phillips, in 1968 purchased a 67.7-acre tract of land in Schoharie County, about two miles from the proposed site of a dam to be built by the Power Authority of the State of New York (PASNY). Plaintiffs intended to sell sand and gravel from their land to PASNY for use in construction of the dam, but the State, on behalf of PASNY, in 1969 appropriated the entire tract in fee. Plaintiffs filed a claim for damages in the Court of Claims and commenced a declaratory judgment action in Supreme Court against defendants, PASNY and the State, to challenge their legal right to take by eminent domain a full fee interest rather than simply an easement, contending that only a small portion of the sand and gravel on the land was actually required for the dam. In Hallock v State of New York (32 NY2d 599), we held that this issue could not be resolved as a matter of law on the record then before us and remitted the case for trial.

Trial was to begin on April 22, 1975, preceded by a pretrial conference that morning. Court rules required that attorneys attending pretrial conferences have **[***512]** authority to enter into binding settlements on behalf of their clients (22 NYCRR 861.17). Plaintiffs were represented by Anthony Quartararo, who had served as their counsel throughout the five-year life of the litigation and had engaged in prior settlement **[**1180]** discussions with defendants. Defendants had offered to settle by reconveying the land to plaintiffs and allowing them to keep the advance they had received, but plaintiffs advised Quartararo that they did not like that offer and wanted the matter to go before the Judge.

Hallock was ill on April 22 and did not attend the pretrial conference. Phillips, however, was present with his long-time **[*229]** attorney, Henry Whitbeck, who had represented plaintiffs in their acquisition of the land. After discussion, counsel entered into a stipulation of settlement whereby Quartararo, for plaintiffs, agreed to accept reconveyance of the land and retention of the advance. The terms of the agreement were dictated into the record. The Trial Judge asked the attorneys for each side separately if they agreed to the settlement, and obtained their

assents. He then observed that according to court rules the settlement "finalized the case," and the case was removed from the Trial Calendar. Throughout these proceedings, Phillips remained silent, as did Whitbeck; Hallock learned of the settlement later that day.

More than two months elapsed before plaintiffs voiced any objection. In mid-July 1975, Hallock expressed his dissatisfaction with the settlement, and plaintiffs thereafter moved to vacate the stipulation, relief which the trial court granted. The Appellate Division, however, ruled that a plenary action was required to set aside a stipulation of settlement (*58 AD2d 67*, app dsmd *43 NY2d 892*), [1] and the present lawsuit followed. After trial, the court directed specific performance of the settlement stipulation, finding that Phillips was bound by the stipulation in view of his presence at the conference, and that Hallock was also bound because he had conferred authority upon Quartararo to negotiate and settle the case and had ratified the settlement. The court concluded that good cause for relief from the stipulation had not been shown.

A divided Appellate Division reversed, the three-Justice majority concluding that Quartararo had no authority to settle the case on the terms embodied in the stipulation, rendering the settlement a nullity, and restored plaintiffs' actions to their respective calendars. [2] The dissenting Justice found Phillips foreclosed from challenging the settlement because of his silence during the pretrial conference, and Hallock bound because he had clothed Quartararo with apparent, if not actual, authority to settle the case. We now reverse and reinstate the judgment of Supreme Court, Schoharie County, specifically enforcing the settlement agreement.

HN3

[*230] Stipulations of settlement are favored by the courts and not lightly cast aside (see *Matter of Galasso, 35 NY2d 319, 321)*. This is all the more so in the case of "open court" stipulations (*Matter of Dolgin Eldert Corp., 31 NY2d 1, 10)* within *CPLR 2104*, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. 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 (*Matter of Frutiger, 29 NY2d 143, 149-150)*. Neither court below found fraud, **[***513]** collusion, mistake or accident; nor can we conclude as a matter of law that such a showing was made. What plaintiffs must then demonstrate in order to sustain their position is that their agent, Quartararo, was without authority of any sort to enter **[**1181]** into the settlement, and therefore no contract ever came into being.

HN4 From the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions (see Code of Professional Responsibility, EC 7-7; *Gorham v Gale, 7 Cow 739, 744*; *Gaillard v Smart, 6 Cow 385, 388)*. But that authority is hardly unbounded. Equally rooted in the law is the principle that, without a grant of authority from the client, an attorney cannot compromise or settle a claim (see *Kellogg v Gilbert, 10 Johns 220*; *Jackson v Bartlett, 8 Johns 361*), and settlements negotiated by attorneys without authority from their clients have not been binding (see *Countryman v Breen, 241 App Div 392*, affd *268 NY 643*; *Spisto v Thompson*, 39 AD2d 598; *Leslie v Van Vranken*, 24 AD2d 658; *Mazzella v American Home Constr. Co.*, 12 AD2d 910).

Quartararo unquestionably had authority from plaintiffs to conduct settlement negotiations with defendants as he had done with plaintiffs' knowledge and assent during the weeks prior to

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[1] This ruling predated our decision in *Teitelbaum Holdings v Gold* (48 NY2d 51), in which we held that ***HN2*** a plenary action is not always required to contest a stipulation of settlement.

[2] Justice Mahoney dissented in part, on the basis of evidentiary rulings which we do not reach, and would have remanded the matter to the Trial Judge with instructions to hold an evidentiary hearing testing counsel's authorization to settle.

April 22, 1975. At most, on April 22 he exceeded the authority plaintiffs urge had been limited shortly before by their injunction to negotiate a better deal. The question raised by this appeal, then, is whether it should be plaintiffs, or defendants, who bear the responsibility for Quartararo's conduct in accepting the settlement they claim had been rejected. We conclude that plaintiffs must bear that responsibility, and are relegated to relief against their former attorney for any damages which his conduct may have caused them (see *Fox v Wiener* **[*231]** *Laces, 105 Misc 2d 672, 676*; *Gaillard v Smart, 6 Cow 385, 388, supra*; *Jackson v Stewart, 6 Johns 34, 37)*. [3]

Phillips cannot be heard to challenge the settlement. He was in court during the entire pretrial conference. At no time during negotiation of the settlement or dictation of the agreement into the record -- or indeed during the more than two months that followed -- did Phillips voice an objection. Phillips acquiesced in, consented to, and is bound by the settlement (see *Owens v Lombardi, 41 AD2d 438, 440-441* [Simons, J.], mot for lv to app den *33 NY2d 515*).

Hallock also is bound by the settlement. Even if Quartararo lacked actual authority because, according to plaintiffs, Quartararo accepted the very settlement his clients had instructed him to reject, still Quartararo had apparent authority to bind Hallock. [4]

HN5 Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. "Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent." (*Ford v Unity Hosp., 32 NY2d 464, 473*; see, also, *Restatement, Agency 2d, § 27*.) Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable (see *Wen Kroy Realty Co. v Public Nat.* **[***514]** *Bank & Trust Co., 260 NY 84, 92-93*; *Restatement, Agency 2d, § 8, Comment c*; Conant, Objective Theory of Agency: Apparent Authority and the Estoppel **[**1182]** of Apparent Ownership, 47 Neb L Rev 678, 681).

Here, as a matter of law, Hallock clothed Quartararo with apparent authority to enter into the settlement. Quartararo had represented plaintiffs through the litigation, engaged in prior settlement negotiations for them and, in furtherance of the authority which had been vested in him, appeared at the final pretrial conference, his presence there constituting an implied **[*232]** representation by Hallock to defendants that Quartararo had authority to bind him to the settlement (22 NYCRR 861.17; see, also, *Di Russo v Grant, 28 AD2d 847*; *Continental Cas. Co. v Chrysler Constr. Co., 80 Misc 2d 552, 554)*. The attendance of the coplaintiff, Phillips, further enforced that appearance. In the circumstances, it necessarily fell to Phillips or Quartararo himself to reveal any restrictions on the attorney's authority to settle, and absent such disclosure defendants' reliance on the appearance of authority was entirely reasonable.

Plaintiffs insist that apparent authority is an equitable doctrine, having its origins in the principle of estoppel (see *Rothschild v Title Guar. & Trust Co., 204 NY 458, 461)*, and that defendants must establish detrimental reliance before the settlement stipulation can be enforced. The discontinuance of lengthy litigation on the day of trial, in reliance on the adversary's settlement stipulation -- even for defendants, who often may prefer that judgment be deferred -- coupled with plaintiffs' silence for more than two months thereafter, is itself a change of position, if such a showing is indeed even

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[3] Quartararo's firm was originally joined as a defendant, but was dropped from the action on consent.

[4] Since we conclude that Quartararo had apparent authority to bind Hallock, we do not reach the alleged evidentiary error in excluding testimony bearing on the issue of Quartararo's actual authority to bind Hallock, or the question whether the relationship between Hallock and Phillips was such that Phillips' conduct would itself bind Hallock.

required before the doctrine of apparent authority may be invoked. [5] We need not inquire whether there was any actual loss of witnesses or evidence, for we recognize that, after five years, halting the machinery of litigation when a trial scheduled to begin that day is marked off the calendar constitutes detriment. Additionally, in the words of the dissenting Justice at the Appellate Division, to set aside this settlement stipulation "invites destruction of the process of open-court settlements, for every such settlement would be liable to subsequent rescission by the simple expedient of a litigant's self-serving assertion, joined in by his attorney and previously uncommunicated to either the court or others involved in the settlement, that the litigant had limited his attorney's authority" (*98 AD2d 856, 858-859*).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the judgment of Supreme Court, Schoharie County, reinstated.

Order reversed, etc.

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[5] See *Greene v Hellman*, 51 NY2d 197, 204; Restatement, Agency 2d, § 8, Comment *d*; Seavey, Rationale of Agency, 29 Yale LJ 859, 873-876; Conant, Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership, 47 Neb L Rev 678, 683-684; Cook, "Agency by Estoppel", 5 Col L Rev 36.

Matter of Siegel

Surrogate's Court of New York, Nassau County

November 18, 2004, Decided

308368

Reporter
5 Misc. 3d 1017(A); 799 N.Y.S.2d 164; 2004 N.Y. Misc. LEXIS 2243; 2004 NY Slip Op 51414(U)

In the Matter of the Accounting by Judy Tray as the Co-Administrator c.t.a. of the Estate of PEARL SIEGEL, Deceased.

Notice: [***1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Affirmed by *Matter of Siegel, 29 A.D.3d 914, 814 N.Y.S.2d 548, 2006 N.Y. App. Div. LEXIS 6911 (N.Y. App. Div. 2d Dep't, May 23, 2006)*

Disposition: Motion to vacate is denied.

Core Terms

settlement, parties, negotiations, terms, vacate, unconscionable, figures

Headnotes/Syllabus

Headnotes

[*1017A] [164]** Stipulations--Setting Stipulation Aside.

Counsel: Iris Horowitz, Esq., Garden City, New York, Petitioner.

Anthony Altimari, Esq., Mineola, New York, Respondent.

Judges: JOHN B. RIORDAN, Judge of the Surrogate's Court.

Opinion by: John B. Riordan

Opinion

John B. Riordan, J.

This is a motion by Judy Tray to vacate the stipulation of settlement entered into on September 23, 2004 between Judy Tray and Brad Guilford. For the reasons that follow, the motion is denied.

The underlying dispute involved an accounting proceeding by Ms. Tray in her capacity as co-administrator c.t.a. Judy Tray and Brad Guilford previously were appointed by the court as co-administrators c.t.a. By order of this court dated May 31, 2002, Judy Tray was directed to file her account. Ms. Tray failed to comply with the court's order, and, thereafter, Mr. Guilford petitioned for her removal. The court granted Mr. Guilford's application, and on September 24, 2002, the court revoked Ms. Tray's letters and directed her to turn over the assets and books and records of the [***2] estate to Mr. Guilford. Ms. Tray once again failed to comply with the court's decree, and an order to show cause for contempt was returnable on December 14, 2002.

Ms. Tray filed her accounting on February 26, 2003. Mr. Guilford filed objections to the account alleging, essentially, mismanagement and misappropriation of the assets by Ms. Tray. A hearing on the objections was scheduled for September 23, 2004. A week before the hearing, counsel appeared before the court for a conference to address various issues relating to the case, including a possible settlement. Counsel for both parties advised the court that they had engaged in prior unsuccessful settlement negotiations, but they were willing to continue those discussions in an effort to avoid a trial. Accordingly, respondent's counsel, Anthony Altimari, Esq., presented petitioner's counsel, Richard Reers, Esq. with a proposed settlement offer. Mr. Altimari informed Mr. Reers that he arrived at his figures based upon petitioner's testimony at her deposition and the limited records which had been provided to him. Contrary to petitioner's allegations, Mr. Reers did, in fact, assert that a number of the disputed transactions were made [***3] pursuant to a power of attorney and in

accordance with the suggestions of an elder law attorney with whom the decedent had consulted. Mr. Reers also argued that many of the expenditures at issue, including, but not limited to, the lease payments for a vehicle, were essentially made on behalf of the decedent since the decedent resided with petitioner and petitioner cared for her. Petitioner's unsubstantiated claim that Mr. Reers failed to advance her interests in the settlement negotiations is unsupported. No agreement was reached at that conference; however, both counsel agreed to continue discussions with their clients regarding settlement. The matter remained on the court's calendar for trial on September 23, 2004.

On September 23, 2004, Ms. Tray and Mr. Guilford, who traveled from Florida, and their respective counsel were all present for the trial. At the request of counsel, settlement negotiations resumed prior to the trial, and after approximately two and one-half hours, a settlement was reached. The settlement was the result of extended give-and-take negotiations during which both counsel conferred continuously with their clients. The extent of the negotiations is evidenced **[***4]** by the detail of the stipulation, which addressed even the distribution of specific items of jewelry and furnishings.

After the court was advised that a settlement had been reached, Ms. Tray and her counsel and Mr. Guilford and his counsel appeared before the court in the courtroom, and the stipulation was read into the record by Mr. Altimari. Although it is not necessary to recite the stipulation in its entirety, the essential terms were as follows. Ms. Tray agreed to pay the sum of $ 75,000.00 to the estate, with $ 50,000.00 to be paid within ten days and the balance to be paid without interest in six months. Ms. Tray agreed to waive her interests in the estate. The stipulation provided, however, that Ms. Tray would retain certain furnishings in her possession, including an antique piece of furniture which her counsel claimed to be quite valuable. After the stipulation was read into the record, the court conducted an allocution of the parties to determine if the agreement was entered into voluntarily and to ascertain whether the parties understood the terms. The court inquired as follows as reflected on page 8 of the transcript:

> "THE COURT: Mr. Reers, is that the stipulation **[***5]** you agree to?
>
> MR. REERS: Yes, it is, your Honor, we agree to the terms thereof.
>
> THE COURT: Ms. Tray, did you hear the stipulation? You have to say a word.
>
> THE PETITIONER: Yes.
>
> THE COURT: Did you understand it?
>
> THE PETITIONER: Yes.
>
> THE COURT: Do you agree to be bound by the terms of the stipulation?
>
> THE PETITIONER: Yes."

A stipulation made in open court is binding on the parties (CPLR 2104). The Court of Appeals has interpreted "open court" to mean "a judicial proceeding in a court, whether held in public or private, and whether held in the courthouse, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened with or without jury, to do judicial business" (*In re Dolgin Eldert Corp., 31 N.Y.2d 1, 4-5, 286 N.E.2d 228, 334 N.Y.S. 2d 833 [1972]*).

Open-court stipulations are favored by the courts and will not be set aside lightly (*Hallock v State of New York, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 [1984]*; *In re Estate of Stark, 233 A.D.2d 450, 650 N.Y.S.2d 608 [1996]*), *Matter of Slaughter*, 206 A.D.2d 537, 614 N.Y.S.2d 767 [1994]; *In re Kaplan, 150 A.D.2d 687, 541 N.Y.S.2d 559* **[***6]** [1989]; *In re Will of Hecht*, 24 A.D.2d 1001, 266 N.Y.S.2d 342 [1965]). Stipulations are especially favored where the parties have been represented by counsel (*In re Estate of Stark, 233 A.D.2d 450, 650 N.Y.S.2d 608 [1996]*; *Heimuller v Amoco Oil Corp.*, 92 A.D.2d 882, 459 N.Y.S.2d 868 [1983]). Stipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process (*Hallock v State of New York, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 [1984]*; *Gage v Jay Bee Photographers, Inc.*, 222 A.D.2d 648, 636 N.Y.S.2d 106 [1995]; *In re Estate of Kanter*, 209 A.D.2d 365, 618 N.Y.S.2d 794 [1994]). Moreover, compromise agreements have consistently been approved in matters involving decedent's estates (*In re O'Keeffe's Estate, 167 Misc. 148, 3 N.Y.S.2d 739 [1938]*). "Agreements of compromise in estates made in the absence of bad faith, imposition, fraud or collusion, have consistently received the approval and ratification of our courts and have been given vigorous support by them . . . . They have been sanctioned and encouraged, particularly in family controversies, in order to avoid burdensome expense, annoyance and inconvenience of litigation"

(citations [***7] omitted) (*In re O'Keeffe's Estate, 167 Misc. 148, 149 [1938]*).

A stipulation of settlement is a contract between the parties (*Gage v Jay Bee Photographers, Inc., 222 A.D.2d 648, 636 N.Y.S.2d 106 [1995]*; *In re Estate of Quade, 121 A.D.2d 780, 503 N.Y.S. 2d 193 [1986]*). Thus, although there is a strong policy in favor of stipulations, the court may in its discretion relieve a party from a stipulation upon a showing of those grounds necessary to avoid a contract such as fraud, collusion, mistake or accident (*Marquez v Rodriguez, 299 A.D.2d 551, 750 N.Y.S.2d 517 [2002]*; *Gage v Jay Bee Photographers, Inc., 222 A.D.2d 648, 636 N.Y.S.2d 106 [1995]*; *Matter of Slaughter, 206 A.D.2d 537, 614 N.Y.S.2d 767 [1994]*).

In the instant case, petitioner argues that the stipulation should be set aside for a myriad of reasons. Specifically, petitioner maintains that she was coerced into accepting the settlement by her attorney, Mr. Reers, because he advised her that she could be liable for approximately $ 400,000.00 if the matter proceeded to trial. Petitioner claims that Mr. Reers advised the court fifteen minutes after the attorneys arrived at the courthouse that a settlement had been [***8] reached. Petitioner further claims that Mr. Reers was mistaken regarding her potential exposure due to his reliance upon Mr. Altimari's figures. She also maintains that Mr. Reers failed to advise her of the binding effect of the stipulation, and that she did not fully understand her obligations under the stipulation. Petitioner contends that the stipulation is unconscionable because she does not have $ 75,000.00 and enforcing the stipulation would unjustly enrich Mr. Guilford.

Petitioner's claim of coercion is contradicted by the extensive and lengthy settlement negotiations which took place approximately a week before the hearing and on the actual date of the hearing. The court, by virtue of its participation in those conferences, knows petitioner's claims regarding the extent of the negotiations to be untrue. In fact, both counsel advised the court at the conference that there had been prior settlement discussions. Clearly, petitioner's assertion that the first time she learned about a possible settlement was on the date of the hearing is unsupported. Similarly, her allegation that the negotiations lasted only fifteen minutes prior to the time the stipulation was put on the record [***9] is also entirely inaccurate as reflected by the transcript which shows that the stipulation was put on the record at 11:40 a.m., approximately two and one-half hours after the negotiations commenced. The length of and give and take nature of the negotiations belies petitioner's claim that the settlement was the result of coercion. Moreover, any indication by Mr. Reers to petitioner that the matter would proceed to trial if she did not settle does not amount to coercion or duress (*In re Estate of Kanter, 209 A.D.2d 365, 618 N.Y.S.2d 794 [1994]*). Petitioner has failed to demonstrate any circumstances which prevented the exercise of her free will (*Heimuller v Amoco Oil Corp., 92 A.D.2d 882, 459 N.Y.S.2d 868 [1983]*; *In re Estate of Kanter, 209 A.D.2d 365, 618 N.Y.S.2d 794 [1994]*).

Petitioner's claim that she would not have entered into the agreement if Mr. Reers' had advised her of the finality of the settlement does not warrant setting aside the stipulation. A mistaken belief regarding the binding effect and the availability of an appeal and its probable success is not sufficient to vacate a stipulation of settlement (*Matter of Rosenhain, 193 A.D.2d 903, 597 N.Y.S.2d 782 [1993]*).

Likewise, [***10] petitioner's purported mistaken belief regarding the extent of her potential liability does not warrant setting aside the stipulation. The party seeking to vacate a stipulation based upon a mistake must overcome a heavy presumption and must establish her position by clear and convincing evidence (*Vermilyea v Vermilyea, 224 A.D.2d 759, 636 N.Y.S.2d 953 [1996]*). The law makes a distinction between a mutual mistake and a unilateral mistake (*Mahonski v State,195 Misc. 2d 580, 760 N.Y.S.2d 629 [2003]*; *Mazzola v CNA Insurance Co., 145 Misc. 2d 896, 548 N.Y.S.2d 610 [1989]*). To void a contract on mutual mistake, the mistake must (i) be substantial, (ii) have existed at the time the agreement was made, and (iii) prevent a meeting of the minds (*Mahonski v State 195 Misc. 2d 580, 760 N.Y.S.2d 629 [2003]*). A contract may also be voided on a unilateral mistake, but only where (i) enforcement would be unconscionable, (ii) the mistake is material and is made despite the exercise of ordinary care by the party in error, (iii) the innocent party had no knowledge of the error, and (iv) it is possible to place the parties in status quo (*Mazzola v CNA Insurance Co., 145 Misc. 2d 896, 548 N.Y.S.2d 610* [***11] [1989]). A party cannot use a mistake to escape the obligations imposed by a stipulation, however, where simple inquiry or ordinary care would have elicited the correct information and revealed the mistake (*In re Jones' Will, 13 Misc. 2d 678, 177 N.Y.S.2d 307 [1958]*; *Mazzola v CNA Insurance Co., 145 Mis.c 2d 896, 548 N.Y.S.2d 610 [1989]*).

In *Vermilyea v Vermilyea (224 A.D.2d 759, 636 N.Y.S.2d 953 [1996])*, the court was faced with a situation similar to the instant case. In *Vermilyea*, the plaintiff-wife moved to vacate an oral stipulation which she claimed was based upon a "mutual mistake." The plaintiff claimed that the parties had mistakenly used an incorrect present value figure for the defendant-husband's pension. The court found that the only evidence of mistake was plaintiff's own counsel's conclusory affidavit that subsequent to the stipulation he was advised by the pension office that the value was incorrect. The court held that this amounted to nothing more than a unilateral mistake and that there were no facts to show fraud or overreaching on the defendant's part. There was no unfairness since both parties relied on the same information. The correct amount could easily **[***12]** have been ascertained. Both parties were represented by counsel and unequivocally agreed to the stipulation in open court. The court held that, "the acceptance of the pension figure may have been improvident, but the fact that it may have been a bad bargain is not sufficient to overturn or set aside an otherwise valid agreement" (*Vermilyea v Vermilyea, 224 A.D.2d 759, 761, 636 N.Y.S.2d 953 [1996]*).

Petitioner's assertions regarding Mr. Reers' statements to her concerning her potential liability are uncorroborated. In view of petitioner's prior history of failing to comply with the court's orders and her blatantly untrue statements regarding the length of the negotiations on the date of the hearing, her credibility is questionable. However, even were the court to accept petitioner's claim that Mr. Reers advised her that her potential liability could be as great as $ 400,000.00, such a statement is merely an opinion. Petitioner's liability, which could have included not only a surcharge but also interest, might well have been substantial since the disputed transactions occurred in 1996.

If not an opinion, the mistake alleged by petitioner is at best a unilateral mistake. Petitioner, **[***13]** other than by conclusory statements, has failed to show any fraud, overreaching or deceptive conduct on the part of respondent or his counsel. Mr. Altimari reviewed his figures with Mr. Reers at the conference and on the date of the hearing. Mr. Reers and petitioner had ample time to investigate and rebut those figures, and Mr. Reers did, in fact, do so. Petitioner had the opportunity to provide additional documentation and to explain the transactions in question, yet she failed to do so at the appropriate time. Clearly, any mistake regarding Mr. Altimari's figures could have been discovered by petitioner and was not the product of fraud or deceptive conduct on the part of Mr. Altimari or respondent. Petitioner cites *Nachman v Nachman (274 A.D.2d 313, 710 N.Y.S.2d 357 [2000])* and *In re Estate of Cohen (18 Misc. 2d 163, 186 N.Y.S.2d 437 [1959])* in support of her position. Both of those cases involved deceptive conduct and fraud.

Furthermore, petitioner has failed to support her claim that the terms of the stipulation are unconscionable. The terms are not so unfair and one-sided that no reasonable person would agree to the stipulation (*Matter of Rosenhain, 193 A.D.2d 903, 597 N.Y.S.2d 782* [***14] [1993]). Unconscionability is contractual overreaching, oppressiveness and unfairness (*Mazzola v CNA Insurance Co., 145 Mis.c 2d 896, 548 N.Y.S.2d 610 [1989]*). Unconscionability will not be found where both parties have been represented by counsel, the parties have equal bargaining power and have engaged in arms-length negotiations (*Mazzola v CNA Insurance Co., 145 Misc. 2d 896, 548 N.Y.S.2d 610 [1989]*).

Petitioner's argument that enforcement of the stipulation will unjustly enrich Mr. Guilford is also unsupported. Petitioner's account shows there is approximately $ 37,500.00 on hand in the estate. According to the stipulation, an additional $ 75,000.00 will be paid to the estate. From that amount, cash bequests of $ 20,000.00 must be paid. Schedule D of the accounting shows claims presented and allowed but unpaid of approximately $ 23,000.00 and a possible claim of approximately $ 3,000.00. Mr. Guilford as the remaining administrator c.t.a. must attend to payment of the bequests, claims and other proper expenses before distribution of the residuary. Thus, the stipulation by its terms does not unjustly enrich Mr. Guilford.

Petitioner knowingly and voluntarily accepted the terms **[***15]** of the stipulation which was made in open court in the presence of the parties and their counsel. The stipulation was dictated into the record after full discussion and negotiations between the parties and their counsel as to every detail. During the allocution of the parties, petitioner acknowledged that she understood and voluntarily agreed to the terms of the stipulation (*see Marquez v Rodriguez*, 299 A.D.2d 551, 750 N.Y.S.2d 517 [2002]; *In re Estate of DePaul*, 249 A.D.2d 390, 670 N.Y.S.2d 364 [1988]; *Matter of Rosenhain, 193 A.D.2d 903, 597 N.Y.S.2d 782 [1993]*). The record establishes that petitioner and her counsel were fully aware of the terms of the stipulation which were clear and unambiguous. Petitioner's application

can only be explained as resulting from a change of mind, which is an insufficient basis on which to vacate the stipulation (*Thompson Medical Co., Inc. v Benjamin Pharmaceuticals, Inc., 4 A.D.2d 504, 167 N.Y.S.2d 267 [1957]*).

Petitioner has not shown any facts sufficient to vacate the stipulation. Accordingly, petitioner's motion is denied in its entirety.

Settle order on five days notice with five additional days if service is made by mail.

Dated: November 18, 2004

[*16]** JOHN B. RIORDAN

Judge of the

Surrogate's Court

New York
Official Reports

233 A.D.2d 450, 650 N.Y.S.2d 608 (Mem)

In the Matter of the Estate of Fred Stark, Deceased. Rocco M. Longo, Petitioner; Harold Stark, Appellant; Rita Stark, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
(November 18, 1996)

CITE TITLE AS: Matter of Stark

SUMMARY

In a proceeding pursuant to SCPA 2110 to fix and determine compensation for legal services rendered to a party in interest to an estate, Harold Stark appeals from an order of the Surrogate's Court, Queens County (Nahman, S.), dated July 11, 1995, which, *inter alia,* granted the motion of the executrix, Rita Stark, to dismiss the petition on the ground that Harold Stark had waived his interest in the estate of Fred Stark.

Ordered that the order is affirmed, with costs payable by the appellant.

The petitioner commenced this proceeding seeking to fix his fees and requesting that the fees be paid out of Harold Stark's share in the estate of Fred Stark. The respondent Rita Stark, the executrix of Fred Stark's estate, moved for summary judgment on the ground that the cause of action was meritless because Harold Stark had waived his interest in the estate. The Surrogate's Court granted Rita's motion, dismissed the petition, and declared that pursuant to a 1993 stipulation entered into between the parties Harold Stark had waived his interest in the estate. We agree.

Strong public policy favors enforcing stipulations *(see,* ***451** *Bossom v Bossom,* 141 AD2d 794). They are not lightly set aside *(see, Matter of Hecht,* 24 AD2d 1001), particularly when the parties are represented by attorneys *(see, Barry v Barry,* 100 AD2d 920, *affd* 64 NY2d 627). Here, there were no allegations of fraud, collusion, mistake or accident, such that would relieve Harold Stark from the consequences of the stipulation, which effectively relinquished his interest in the estate *(see, Hallock v State of New York,* 64 NY2d 224).

We have examined the appellant's remaining contentions and find them to be without merit.

O'Brien, J. P., Sullivan, Joy and McGinity, JJ., concur.

End of Document

Suslow v. Rush

Supreme Court of New York, Appellate Division, First Department

May 3, 1990

No. 40108W

Reporter
554 N.Y.S.2d 620; 1990 N.Y. App. Div. LEXIS 4917; 161 A.D.2d 235

Lawrence Suslow, Plaintiff-Appellant, v. Laurence M. Rush, et al., Defendants-Respondents

Prior History: **[**1]** Order, Supreme Court, Westchester County (Harold L. Wood, J.), entered on or about May 12, 1989, which expanded the scope of an enforcement proceeding pursuant to *CPLR 2104* to include the issue of whether defendants' prior attorney was authorized to enter such a settlement, is unanimously affirmed, without costs.

Core Terms

settlement, binding

Counsel: T.R.Beirne, for Plaintiff-Appellant.

A.D.Fox, D.M.Richman, for Defendants-Respondents.

Opinion

[*620] Authority of an attorney to enter into settlement negotiations does not necessarily constitute authority to enter into a binding settlement under *CPLR 2104*, unless that settlement is entered into in open court. *See Hallock v State of New York, 64 NY2d 224*; *Popescu v Comoletti, 130 AD2d 724*. A question as to such authorization is an appropriate subject for an evidentiary hearing. *Slavin v Polyak*, 99 AD2d 466. In light of the fact that the court has already ordered a hearing on the question of compliance with the stipulation of settlement, plaintiff has failed to demonstrate how he will be prejudiced by expansion of **[*621]** the hearing agenda to include the question of whether defendants' prior attorney was authorized to enter into a binding **[**2]** agreement on their behalf, which agreement is purportedly represented by the letter of June 2, 1988, exchanged between attorneys.

Order filed.

Rosenberger,J.P., Kassal, Ellerin, Smith, Rubin, JJ.

Kuncman v American Portfolios Fin. Servs., Inc.

Supreme Court of New York, Nassau County

October 8, 2009, Decided

6853/09

Reporter
25 Misc. 3d 1218(A); 901 N.Y.S.2d 907; 2009 N.Y. Misc. LEXIS 2931; 2009 NY Slip Op 52172(U)

Rachel Kuncman, Plaintiff, against American Portfolios Financial Services, Inc., Steven A. Sherman, the Estate of Abraham Salomon And Tobi Weinstein, individually and as the Executrix of The Estate of Abraham Salomon, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

decedent's, alleges, signature, settlement agreement, cause of action, joint account, transferred, probate, the will, authorization, Securities, parties, probate proceeding, general release, testamentary, settlement, documents, Releasee, Releasor, assigned, banking, signing, forged

Headnotes/Syllabus

Headnotes

[*1218A] **[**907]** Release--Vacatur. Banks and Banking--Joint Account--Transfer of Assets.

Judges: **[***1]** Stephen A. Bucaria, J.

Opinion by: Stephen A. Bucaria

Opinion

Stephen A. Bucaria, J.

This motion, by the attorneys for the defendants American Portfolios Financial Services and Steven A. Sherman, for an order pursuant to CPLR 3211(a)(5) dismissing this action as against American Portfolios Financial Services and Steven A. Sherman is granted; and a cross-motion, by the attorneys for the defendants Tobi Weinstein individually and as the executrix of the estate of Abraham Salomon, for an order pursuant to CPLR 3211(a)(1)(5) and (7) dismissing this action as against her and the estate of Abraham Salomon is granted.

Plaintiff alleges that she, along with her father Abraham Salomon ("Salomon") and sister Tobi Weinstein ("Weinstein") were joint tenants with rights of survivorship in a brokerage account maintained at Sandgrain Securities, Inc. The account at Sandgrain Securities was transferred to a joint account at American Portfolios Financial Services, Inc. ("American Portfolios"). Plaintiff alleges that on or about May 1, 2006, the joint account assets were transferred without her authorization to an individual account in the name of Abraham Salomon. Plaintiff contends that the joint account holders' written **[***2]** transfer authorization contained her forged signature. Two years later, on May 16, 2008, Abraham Salomon died. In her complaint dated April 9, 2009, plaintiff wants "to recover her lawful share of the funds" in the joint and individual accounts. (Complaint P 17). Defendant Weinstein filed a Petition in the Surrogate's Court, Nassau, for the probate of the decedent's Last Will and Testament dated August 20, 2006. Plaintiff was cited in the probate proceeding because she was adversely affected by the Will. Plaintiff took nothing under the Will. Plaintiff filed Objections to Probate of the Will in June, 2008. After conducting documentary discovery concerning the Will, Weinstein and plaintiff entered into a Settlement Agreement pursuant to which plaintiff executed a Withdrawal of Objections to Probate and Consent to Probate dated November 19, 2008. The Nassau County Surrogate's Court then issued a Decree dated January 23, 2009, admitting the Will to probate and issued Letters Testamentary to Ms. Weinstein. The consideration

passing to plaintiff under the Settlement Agreement consisted of personal property with respect to which plaintiff claimed ownership. The parties agreed that the consideration [***3] referenced in the Agreement "satisfie[d] any right [Plaintiff] ha[d] to any bequest, legacy, or other entitlement to the property of the Decedent or the Estate, wherever located. (Agreement P 7). Plaintiff waived an accounting. The parties executed mutual general releases.

The general release that the plaintiff executed in favor of Weinstein (individually and in her fiduciary capacity) and the Estate provided as follows:

> To all to whom these Presents shall come or may Concern, Know That Rachel Leah Kuncman, Individually and as Co-Trustee of the Abraham and Frances Salomon Irrevocable Life Insurance Trust, as Releasor, in consideration of the sum of Ten ($ 10.00) Dollars and other valuable consideration received from Tobi Weinstein, individually and as Preliminary Executrix of the Estate of Abraham Salomon, as Releasee, receipt whereof is hereby acknowledged, releases and discharges the Releasee, Releasee's heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, [***4] executions, claims, and demands whatsoever, in law, admiralty or equity, which against the Releasee, the Releasor, Releasor's heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of the date of this Release. The words "Releasor" and Releasee" include all releasors and all releasees under this Release. This Release may not be changed orally.

Weinstein--in her individual and fiduciary capacity--executed a mutual release in favor of plaintiff. The parties to the Settlement Agreement also agreed that "the Nassau County Surrogate's Court shall retain continuing jurisdiction in order to carry out, construe and enforce any of the terms of this Agreement" (Agreement P 12).

Defendants Weinstein and the Estate move to dismiss as to them based on the stipulation and the general release executed by the plaintiff. In the alternative, Weinstein and the Estate request this matter be transferred to Nassau County Surrogate's Court in the event the motion to dismiss is denied. Paragraph 12 of the Agreement provides that "the parties hereto [***5] each consent that the Nassau County Surrogate, after the execution of the release and stipulation of settlement, shall retain continuing jurisdiction in order to carry out, construe and enforce any of the terms of this Agreement." Surrogate Riordan initially recused himself from presiding over the contested probate proceeding because a member of the Court's staff (an attorney formerly in private practice) drafted a prior testamentary instrument for the decedent. The matter was assigned to a Justice of the Supreme Court, Suffolk County, as acting Nassau County Surrogate. After the execution of the release and stipulation of settlement, the decedent's will has since been admitted to probate by a decree of the Surrogate's Court, Nassau County-- not Suffolk County--and the decedent's estate has been administered in Surrogate's Court Nassau County. Plaintiff commenced the within action in Nassau County Supreme Court and asserts the action should not be transferred to Suffolk County but rather, remain in Nassau County Supreme Court since all the major parties reside in Nassau County, other than the plaintiff who resides in Florida. Neither the plaintiff nor the defendants Weinstein and the [***6] Estate object to this Court's deciding the within motions on the merits.

Plaintiff alleges in the complaint that she, together with the decedent and Weinstein, were joint tenants with right of survivorship in Account No. 5AU-010017, maintained at Sandgrain Securities, Inc., in Garden City, New York. She alleges that the account had a value in excess of $ 450,000, and that on or about March 15, 2005, the owners of the account signed an authorization instructing Sandgrain to issue a check in the amount of $ 2,492.00 to the decedent monthly.

Plaintiff further alleges that in early May 2006, the account was transferred by defendant Steven A. Sherman (a branch manager in the Rockville Centre office of American Portfolios) to American Portfolios and assigned Account No. 56V075406, after which time it was managed by Sherman. Plaintiff alleges that on or about May 1, 2006, the account was "secretly and without the authorization consent or direction of [plaintiff] transferred by Sherman and American Portfolios to an individual account in the name of Abraham Salomon, under Account No. 56V-077493. She further alleges that her signature on the letter authorizing the transfer

of the Account was [***7] forged; and that the next day, on or about May 2, 2006, Sherman and American Portfolios set up the new account as a joint account in the name of both the decedent and Weinstein, and that the application for that account also contained her forged signature. Plaintiff alleges that on the date of the decedent's death, the account had a value "in excess of $ 700,000" (P 15). According to plaintiff, all of the foregoing actions were part of a "scheme to remove plaintiff from [the account] and conceal the removal from her, as part of [defendant's] scheme to defraud her and convert her property" (complaint P 16). The complaint contains five causes of action. The first, asserted against Sherman and American Portfolio, alleges that they had a duty to verify plaintiff's signature on the transfer documents in order to prevent unauthorized fund transfers, and claims that they acted negligently in failing to do so. The second cause of action asserts a purported claim for breach of contract against American Portfolios. The third cause of action, also asserted against Sherman and American Portfolios, claims that they "aided and abetted" Weinstein and the Estate in the unauthorized transfer of funds, [***8] thereby converting plaintiff's property. The fourth cause of action, asserted against Weinstein and the Estate, alleges that they "forged or caused to be forged" the unauthorized signature of plaintiff on the purported transfer letter dated May 1, 2006 and the account application form for Account No. 56V-007493, and concealed their misconduct from plaintiff, thereby converting her funds. The fifth cause of action, also asserted against Weinstein and the Estate, is for unjust enrichment and is based on the same allegations as the previous causes of action.

Plaintiff's causes of action are based on her contention that assets from the joint account, with her father Abraham Salomon and her sister Tobi Weinstein, were transferred without her authorization in May 2006. Banking Law § 675 provides that a joint account holder is permitted to transfer assets from a joint account and that the banking organization making the transfer cannot be held liable unless it had a specific direction requiring the signature of all signators not to pay. NY Banking Law § 675 states, in part:

> When a deposit of cash, securities, or other property has been made or shall hereafter be made in or with any banking [***9] organization . . . in the name of such depositor . . . and another person and in form to be paid or delivered to either, or the survivor of such persons, after the making thereof, shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization . . . for all payments or deliveries made on account of such deposit . . . prior to the receipt by the banking organization . . . of notice in writing signed by any one of such joint tenants, not to pay or deliver such deposit . . . and the additions and accruals thereof. . . . (emphasis added).

In opposition to the motion by defendants American Portfolios and Sherman, the plaintiff argues that they should not be permitted to hide behind the language of Banking Law § 675 since plaintiff's signature on the transfer documents [***10] was a forgery and the bank's own internal rules and regulations required the valid signature of all three depositors on a document directing a transfer of the account. Counsel for plaintiff has cited no authority to contradict the language of Banking Law § 675. "The protection provided in prior statutes for the banking organization in paying out to either of the co-tenants has not been disturbed." (McKinney's Cons. Law of NY Books 4, 5, Banking Law § 675, Historical and statutory notes pgs. 206-207).

In interpreting the statute we are guided by a well-settled principle of statutory construction: courts normally accord statutes their plain meaning, but "will not blindly apply the words of a statute to arrive at an unreasonable or absurd result" (*Williams v Williams, 23 NY2d 592, 599, 246 N.E.2d 333, 298 N.Y.S.2d 473; see also Matter of Rouss, 221 NY 81, 91, 116 N.E. 782; Holy Trinity Church v United States, 143 U.S. 457, 460, 12 S. Ct. 511, 36 L. Ed. 226; People v Santi, 3 NY3d 234, 818 N.E.2d 1146, 785 N.Y.S.2d 405*). "It is equally well settled that "[i]n implementing a statute, the courts must of necessity examine the purpose of the statute and determine the intention of the Legislature" (*Williams, 23 NY2d at 598*). Indeed, "[t]he primary consideration of the courts in the construction of statutes [***11] is to ascertain and give effect to the intention of the Legislature" (McKinney's Cons. Laws of NY, Book 1, Statutes § 92[a], at 177). Legislative intent drives judicial interpretations in matters of statutory construction (*see People v Allen, 92 NY2d 378, 383, 703 N.E.2d 1229, 681 N.Y.S.2d 216 [1998]*)" (*People v Santi, supra*).

In light of the fact that American Portfolios was not given contrary written instruction, pursuant to Banking Law § 675, American Portfolios could have closed the joint account with only the signature of defendant Weinstein and her father to the exclusion of the signature of the plaintiff. The motion by defendants American Portfolios and Sherman dismissing the complaint as to them based on Banking Law § 675 is granted.

A release "is a jural act of high significance without which the settlement of disputes would be rendered all but impossible" (see *Liling v Segal*, 220 AD2d 724, 725-726, 633 N.Y.S.2d 199). When a release is clear and unambiguous on its face and was knowingly and voluntarily entered into, it will be enforced as a private agreement between the parties (*L & K Holding Corp. v Tropical Aquarium at Hicksville, Inc.*, 192 AD2d 643, 596 N.Y.S.2d 468). A release will not be treated lightly and will be set aside by a court only **[***12]** for duress, illegality, fraud, or mutual mistake (*see also Bodisher v. Hofmann*, 50 A.D.3d 720, 854 N.Y.S.2d 316; *Matter of Stark, 233 A.D.2d 450, 650 N.Y.S.2d 608*).

In opposition to the motion to dismiss, the plaintiff argues that the general release and Settlement Agreement be set aside or limited based on the allegation that a forgery and fraud were committed and that the general release was given under fraudulent circumstances.

"The elements of fraud include a misrepresentation, known by the defendant[s] to be false and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance and damages" (*Van Kleeck v. Hammond, 25 A.D.3d 941, 811 N.Y.S.2d 452, 3rd Dept., 2006*; *Mora v RGB, Inc., 17 A.D.3d 849, 852, 794 N.Y.S.2d 134, 2005*). To establish a cause of action alleging fraud, a plaintiff must demonstrate: "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations" (*Giurdanella v Giurdanella*, 226 AD2d 342, 343, 640 N.Y.S.2d 211; *see Crafton Bldg. Corp. v St. James Constr. Corp., 221 AD2d 407, 408, 633 N.Y.S.2d 795*; **[***13]** *Bank of New York v Realty Group Consultants, 186 AD2d 618, 588 N.Y.S.2d 602*; *Blumberg v Patchogue-Medford Union Free School Dist., 18 AD3d 486, 795 N.Y.S.2d 81*; *Brannigan v Board of Educ. of Levittown Union Free School Dist.*, 18 AD3d 787, 796 N.Y.S.2d 690).

After the issue of letters testamentary (January 23, 2009), the attorneys for the estate sent a letter dated February 9, 2009, to the plaintiff's former attorney stating that a bank account in the name of Abraham Salomon had five beneficiaries: Rachel Kuncman, Matthew Kuncman, Tobi Weinstein, Carly Weinstein and Brandon Weinstein. The account had a balance of $ 450,774.27. Weinstein sought the plaintiff's consent to close the account, place $ 112,400 in the estate account to pay the estate taxes allocable to the account and distribute the balance among the beneficiaries.

Plaintiff asserts the existence of this Account was hidden from her since Weinstein did not want the plaintiff to know there was an account created by their father three months before his death that left the plaintiff $ 90,000. Further, she contends the discovery of the account goes against the decedent's last Will and contradicts a purported DVD in which he describes why he left the plaintiff only one dollar. The **[***14]** plaintiff states: "[i]f I had known about the account I probably would not have withdrawn my Objections to probate and the case would not have been settled. My other belief is that my sister probably thought that she could receive all of the funds in the account; she and her two children were the other beneficiaries on the account even though my son and I were named as beneficiaries. Only when she learned that the holder of the account, Bank United, insisted on my son's and my signatures was I advised of the discovery' " (Kuncman affidavit in opposition P 14).

Plaintiff alleges that this newly discovered Account led her to wonder if there were other accounts established by her father that had not been disclosed. She went through some of her old storage files and found a document from Sandgrain Securities. She contacted Sandgrain Securities and was advised the account had been transferred to American Portfolios.

A crucial element of fraud is justifiable reliance (*see Shovak v Long Island Commercial Bank, 50 AD3d 1118, 1121, 858 N.Y.S.2d 660*; *New York City School Const. Auth. v Koren-DiResta Const. Co., Inc., 249 A.D.2d 205, 671 N.Y.S.2d 738*). Plaintiff was represented by counsel. As a respondent in a probate proceeding she **[***15]** had the ability to discover documents regarding the decedent's assets (*see* SCPA § 1404; *Matter of DeLisle, 149 A.D.2d 793, 539 N.Y.S.2d 588*; Uniform Rules for Surrogate's Court, 22 NYCRR 202.27).

Even considering the allegations of the complaint to be true and according the plaintiff the benefit of every

favorable inference, there is an absence of justifiable reliance to state a cause of action to recover for fraud or collusion against the decedent and/or Weinstein.

In P 8 of the complaint the plaintiff alleges:

On or about March 15, 2005, Abraham Salomon, Rachel Kuncman and Tobi Weinstein signed an authorization that instructed Sandgrain to issue a check in the amount of $ 2,492 to Abraham Salomon on the 25th day of each month thereafter.

Plaintiff's allegation that she, along with the defendant and decedent, signed an authorization on or about March 15, 2005, regarding the Sandgrain joint account makes her alleged reliance unreasonable and unjustifiable (the release and settlement agreement were signed in November 2008). Also, plaintiff acknowledged that prior to signing the release and settlement agreement she had documents in her possession regarding the Sandgrain account. Among those items discoverable **[***16]** in a contested probate proceeding are documents which contain information as to: (i) a proponent's knowledge of decedent's assets prior to the will execution; (ii) the value of decedent's estate; (iii) whether decedent divested himself of assets in the years prior to his death; and (iv) any financial records of decedent or a proponent which might reveal information of this nature (*Matter of Du Bray, 132 A.D.2d 914, 518 N.Y.S.2d 245*; *Matter of Fox*, 100 AD2d 744, 473 N.Y.S.2d 631; *Matter of Schneier*, 50 A.D.2d 715, 374 N.Y.S.2d 872). In *Matter of Abu-Regiaba*, (21 Misc. 3d 1106[A], 873 N.Y.S.2d 231, Surrogate's Court, Nassau County, September 30, 2008), Surrogate Riordan stated:

> A party bears the risk of a mistake when he is aware, at the time a contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient (Restatement [Second] of Contracts *§ 154*). A party cannot rely upon her ignorance of a condition which she could have discovered using ordinary care (*P.K. Development, Inc. v Elvem Development Corp., 226 A.D.2d 200, 640 N.Y.S.2d 558, 1st Dept., 1996*; *Vandervort v Higginbotham, 222 A.D.2d 831, 634 N.Y.S.2d 800, 3rd Dept., 1995*). In *Matter of Ham* (N.Y.L.J., May 15, 2002 at 22, col. 3) the court denied **[***17]** an application by the co-administrator of decedent's estate to reform a stipulation of settlement which provided for a distribution of the decedent's probate and non-probate assets after she later discovered that one of the non-probate assets was a Totten trust for her benefit, finding that her failure to ascertain the beneficiary designation on the largest of the decedent's bank accounts could only be ascribed to negligence.

The plaintiff had the opportunity to make use of any or all of the aforesaid discovery devices prior to signing the release and settlement agreement. Moreover, plaintiff had the option of waiting for the production by the estate of a copy of ET-706 Form - US Estate Tax Return prior to signing the release in order to ascertain all of the testamentary and non-testamentary assets. Plaintiff knowingly and voluntarily negotiated and entered into the Settlement Agreement with Weinstein and the Estate, the clear intent of which was to resolve all issues concerning the estate and the assets of the decedent. She expressly agreed to waive any interest in the assets of the estate. The case of *Cahill v Regan, (5 NY2d 292, 157 N.E.2d 505, 184 N.Y.S.2d 348)* cited by the plaintiff, is factually and legally distinguishable. **[***18]** In *Cahill*, the releases executed were solely concerned with settling the controversy being litigated--the ownership of machinery in the employer's possession, a subject having no relation to the invention or patent. In the within action plaintiff acknowledged she had records regarding the disputed account in her possession prior to signing the release. Moreover, the settlement in the context of the probate proceeding was extensive and the plaintiff had the opportunity to ascertain the existence of all testamentary and non-testamentary assets of the estate before signing the settlement agreement and release. Plaintiff's failure to make the inquiries that precipitated this action before she executed the settlement agreement render her reliance on any alleged misrepresentations unreasonable and unjustifiable as a matter of law (*see KNK Enters., Inc. v Harriman Enters, Inc.*, 33 AD3d 872, 824 N.Y.S.2d 307).

Motion by the defendants Weinstein and the Estate dismissing the complaint as to them is granted. The court has considered the plaintiff's remaining arguments and finds them to be without merit.

This is the decision and order of the Court.

This order concludes the within matter assigned to me pursuant to **[***19]** the Uniform Rules for New York State Trial Courts.

DatedXXXJ.S.C.

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 15. Attorneys and Counsellors (Refs & Annos)

McKinney's Judiciary Law § 487

§ 487. Misconduct by attorneys

Currentness

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Credits
(Added L.1965, c. 1031, § 123, eff. Sept. 1, 1967.)

McKinney's Judiciary Law § 487, NY JUD § 487
Current through L.2021, chapters 1 to 636. Some statute sections may be more current, see credits for details.

End of Document

51 Misc.3d 401
Supreme Court, Westchester County, New York.

KALLISTA, S.A., and Linda Gillette Parodi, Plaintiff,
v.
WHITE & WILLIAMS LLP, Randy Friedberg, and Does 1 Through 10, Defendants.

Jan. 7, 2016.

Synopsis

Background: Swiss client and its alleged co-founder, who was citizen of both Switzerland and United States, sued law firm and attorney, claiming legal malpractice, fraudulent concealment, breach of contract, and violation of Judiciary Law imposing criminal penalties and treble damages for deceit or **collusion** by attorney, all of which arose from representation of client in prosecution of applications for registration of trademarks, "KALLISTA" for skin care products and "ETHERIA" for hair care products. Defendants moved to dismiss for failure to state cause of action.

Holdings: The Supreme Court, Alan D. Scheinkman, J., held that:

[1] breach of contract claim was duplicative of legal malpractice claim;

[2] fraudulent concealment claim was duplicative of legal malpractice claim;

[3] attorney and law firm did not violate Judiciary Law;

[4] co-founder lacked standing to pursue legal malpractice claim;

[5] lost profits damages were not recoverable; but

[6] sunk costs damages were recoverable.

Motion granted.

West Headnotes (21)

[1] **Pleading** ⇐ Particular causes or grounds of action

A breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of a legal malpractice claim.

[2] **Pleading** ⇐ Particular causes or grounds of action

The test of whether a breach of contract claim is duplicative of a legal malpractice claim is not whether the theory is the same; the test is whether the facts alleged and relief sought are the same.

[3] **Pleading** ⇐ Particular causes or grounds of action

Swiss client's claim against law firm for alleged breach of contract in which law firm impliedly promised to provide competent legal services to prosecute trademark registration applications was barred, as duplicative of client's legal malpractice claim, where both claims arose from same facts and sought same damages.

[4] **Pleading** ⇐ Particular causes or grounds of action

A fraud cause of action, like a contract cause of action, that arises from the same facts as a legal malpractice cause of action is duplicative of the legal malpractice cause of action unless distinct damages are alleged.

[5] **Pleading** ⇐ Particular causes or grounds of action

Swiss client's claim against law firm and attorney for alleged fraudulent concealment of their misconduct in prosecuting trademark registration applications on behalf of client was barred, as duplicative of client's legal malpractice

claim, where both claims arose from same facts and sought same damages of sunk costs, lost profits, and loss of income.

[6] **Attorneys and Legal Services** ⇐ Fraud, Deceit, and Misrepresentation

There is no independent cause of action for concealing legal malpractice.

[7] **Fraud** ⇐ Duty to disclose facts

A cause of action to recover damages for fraudulent concealment requires, in addition to scienter, reliance, and damages, a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty on the defendant to disclose material information and that the defendant failed to do so.

1 Cases that cite this headnote

[8] **Attorneys and Legal Services** ⇐ Fraud, deceit, and **collusion**

Attorneys and Legal Services ⇐ Actions by Non-Clients

Judiciary Law imposing criminal penalties and treble damages against attorney for any deceit or **collusion** with intent to deceive the court or any party provides for a cause of action against an attorney in two circumstances: (1) where the alleged deceit or **collusion** with the intent to deceive any party occurred in a pending judicial proceeding, or (2) where deception is directed against a court and the deception relates to either a prior judicial proceeding or one which may be commenced in the future. McKinney's Judiciary Law § 487.

[9] **Attorneys and Legal Services** ⇐ Punitive or exemplary damages

To make out a claim under Judiciary Law, imposing criminal penalties and treble damages against an attorney for any deceit or **collusion** with intent to deceive the court or any party, the deceit complained of must have occurred during a judicial proceeding to which the plaintiff was a party. McKinney's Judiciary Law § 487.

[10] **Attorneys and Legal Services** ⇐ Fraud, deceit, and **collusion**

Law firm and attorney who allegedly engaged in deceit and **collusion** with intent to deceive Swiss client by filing petition with United States Trademark Trial and Appeal Board to cancel trademark "KALLISTE" that allegedly infringed client's mark, "KALLISTA" for skin care products, and to suspend prosecution of client's applications for trademark registration, without informing client, obtaining client's consent, or adequately investigating merits of claim, did not violate Judiciary Law imposing criminal penalties and treble damages against attorney for any deceit or **collusion** with intent to deceive court or any party, where alleged deceit was committed in course of administrative proceeding rather than in court. McKinney's Judiciary Law § 487.

[11] **Attorneys and Legal Services** ⇐ Fraud, deceit, and **collusion**

Judiciary Law, imposing criminal penalties and treble damages against an attorney for any deceit or **collusion** with intent to deceive the court or any party, does not apply to the filing of a petition with an administrative agency, whether state or federal. McKinney's Judiciary Law § 487.

[12] **Criminal Law** ⇐ Liberal or strict construction; rule of lenity

In the criminal law, where two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the "rule of lenity."

[13] **Attorneys and Legal Services** ⇐ Lawyers not admitted, licensed, or authorized in jurisdiction

A person who practices before the United States Patent and Trademark Office need not be a

member of the New York Bar, though if he or she is a member of the New York Bar, he or she is subject to discipline by the New York authorities. 35 U.S.C.A. § 2(b)(2)(D).

[14] **Attorneys and Legal Services** Parties; standing

Swiss client's alleged co-founder lacked standing to sue law firm and attorney for legal malpractice in representing client for prosecution of trademark registration applications, pursuant to legal services contract between client and law firm, since manager lacked privity of contract, as she was not owner, officer, or employee at time that contract was executed, and she was not foreseeable third-party beneficiary of contract.

[15] **Attorneys and Legal Services** Pleadings

To state a cause of action for legal malpractice, a plaintiff must plead actual, ascertainable damages resulting from the attorney's negligence; conclusory or speculative allegations of damages are insufficient.

[16] **Attorneys and Legal Services** Pleadings

Plaintiff asserting legal malpractice claim is not obligated to show, on a motion to dismiss for failure to state a cause of action, that it actually sustained damages; rather, it is sufficient if plaintiff pleads allegations from which damages attributable to defendant's malpractice might reasonably be inferred.

[17] **Attorneys and Legal Services** Measure and amount

Swiss client's alleged lost profits from legal malpractice of law firm and attorney representing client, in prosecuting application for registration of trademark, "KALLISTA," for skin care products, were not ascertainable with reasonable certainty, as required for recovery of lost profit damages, where client was start-up enterprise that was only preparing to launch its skin care product line, but had not made any actual product sales, at time of alleged malpractice.

[18] **Attorneys and Legal Services** Measure and amount

Swiss client's alleged sunk costs from legal malpractice of law firm and attorney representing client, in prosecuting application for registration of trademark, "KALLISTA," for skin care products, were recoverable as damages for legal malpractice claim, where client was investing money in its skin care business, particularly toward marketing of trademarked products, and some expenditures and investments in trademark may not have been incurred had law firm and attorney timely informed client of significant risk to use of mark due to competitor's registered mark, "KALLISTE."

[19] **Trademarks** Alphabetical listing

ETHERIA.

[20] **Trademarks** Alphabetical listing

KALLISTA.

[21] **Trademarks** Alphabetical listing

KALLISTE.

Attorneys and Law Firms

**334 Law Offices of Daniel L. Abrams, PLLC By: Daniel L. Abrams, Esq., New York, Attorneys for Plaintiffs.

Matalon Shweky Elman PLLC By: Howard L. Elman, Esq., New York, Attorneys for Defendants.

Opinion

**335 ALAN D. SCHEINKMAN, J.

*403 Defendants White & Williams LLP ("White & Williams" or "Law Firm") and Randy Friedberg ("Friedberg") (collectively "Defendants") move, pursuant to CPLR 3211(a)(7), to dismiss: (1) the Second, Third and Fourth Causes of Action[1] of the Complaint; (2) the First Cause of Action as to " damage theories" and as to Plaintiff Linda Gillette Parodi ("Parodi"); and (3) the demands of both Parodi and co-Plaintiff Kallista, S.A. ("Kallista") (collectively "Plaintiffs") for punitive damages. Plaintiffs oppose all aspects of the motion.

This action arises out of claims that the Law Firm committed legal malpractice, and then fraudulently concealed its misconduct, in its representation of Kallista in relation to certain trademark registration applications. The action was commenced by the filing of the Summons and Complaint on August 4, 2015. Defendants moved to dismiss on October 2, 2015. This Court held a Preliminary Conference with counsel on October 16, 2015. Since the Court perceived that this motion would not result in the dismissal of all claims as against both Defendants, the Court directed that discovery proceed during the pendency of this motion. Discovery is scheduled to be completed by May 5, 2016 and a Trial Readiness Conference is scheduled for May 6, 2016. Plaintiffs submitted their opposition to the motion on October 30, 2015 and Defendants their reply on November 12, 2015. The motion was submitted for decision on November 13, 2016.

THE COMPLAINT

According to the Complaint, the allegations of which must be assumed as true for the purposes of this motion, Kallista is a Swiss corporation and has its principal place of business in Geneva (Affirmation of Howard I. Elman, Esq., dated October 2, 2015 ["Elman Aff."], *404 Ex. 1, ¶ 4). Parodi is said to be a citizen of both Switzerland and the United States, residing in Switzerland (*id.*¶ 5). The Law Firm is a Pennsylvania partnership and has maintained offices in Manhattan and in Pleasantville (*id.* ¶ 6). Friedberg is a member of the New York Bar, a resident of Scarsdale, and is a partner in the Law Firm's Manhattan office (*id.* ¶ 8).

Kallista was established in April 2012 to engage in the production and sale of skincare products. A sister company, Etheria, S.A. ("Etheria") was set up at the same time for the production and sale of hair care products. Both companies are managed by Parodi, and her husband, Pierre. Pierre is the owner of Kallista (*id.*, ¶ 11).

Plaintiffs allege that, in late March and early April 2012, Kallista initially consulted with Friedberg regarding the preparation of a trademark application for the name "KALLISTA" for skincare products in the United States. Friedberg was also consulted regarding a trademark application for the name "ETHERIA") for hair care products in the United States (*id.* ¶ 12). On May 2, 2012, Kallista, Etheria, and the Law Firm entered into an agreement pursuant to which the Law Firm was to perform legal services for both companies, including the preparation and processing of the two trademarks (*id.* ¶ 13). In May 2012, Parodi was employed as a senior executive of Proctor & Gamble and Friedberg knew that she intended to leave that position as soon as the Kallista business was operational (*id.* ¶ 14).

Plaintiffs assert that, as early as November 2011, Kalliste Oraganics, Inc. ("Kalliste") **336 branded soap and skincare products which were sold throughout the United States under the name "KALLISTE". Plaintiffs say that a full and complete trademark search would have revealed the existence of the Kalliste product line (*id.* ¶¶ 15, 20). Despite this, on June 1, 2012, Friedberg reported to Kallista that his search of certain data bases indicated a low level of risk, that it was not necessary to do a full trademark search, and that he believed that the marks were available. On June 18, 2012, Kallista instructed Friedberg to proceed with registration for both marks (*id.* ¶ 16).

Plaintiffs assert that Defendants did not proceed with the trademark applications, even though they invoiced Kallista for the cost of the applications and falsely represented that the applications had been filed (*id.* ¶¶ 16–17). In February, 2013, Kallista asked Friedberg about the status of the applications and, *405 in particular, as to whether Kallista products could be sold before the end of the summer and whether there was any risk. Friedberg allegedly advised that selling should start as soon as possible because the registration could not be finalized until that was done (*id.* ¶ 17). On July 24, 2013, Kallista wrote to Friedberg as to the status of the trademarks, noting that a regulatory agency had informed Kallista that the KALLISTA mark had not been registered. Friedberg is alleged to have responded by filing applications for both Etheria and Kallista that day (*id.* ¶ 18).

Plaintiffs allege that Defendants did not perform a trademark search of the United States Patent and Trademark Office ("USPTO") database and that, if such a search had been conducted, it would have been revealed that Kalliste

Organics, Inc. ("Kalliste") had a trademark application for KALLISTE. Kalliste asserted in its application that it first used the KALLISTE mark in 2008. Registration of Kalliste's trademark was issued on October 15, 2013 (*id.* ¶ 20).

In September 2013, Parodi resigned from Proctor and Gamble, giving up a $250,000 annual salary and generous benefits (*id.* ¶ 21).

On November 15, 2013, Friedberg received an Office Action from USPTO stating that there was likelihood of confusion between the KALLISTE registration and the KALLISTA application, which were in the same class of products, and therefore the KALLISTA application was refused. Plaintiffs allege that Friedberg did not tell Kallista about this development and did not tell Kallista that the KALLISTE registration was a substantial legal threat to Kallista's business since the KALLISTA mark posed a serious risk of infringement on the KALLISTE mark (*id.* ¶ 22).

Kallista, allegedly unaware of any trademark issues, successfully launched a KALLISTA product line in the United States in January 2014 (*id.* ¶ 23). On May 15, 2014, Friedberg filed a petition with the United States Trademark Trial and Appeal Board (the "Board") to cancel the KALLISTE mark on the ground of fraud, and also filed a request to suspend the application for the KALLISTA mark. Friedberg is alleged to have taken these actions without informing Kallista or obtaining its consent (*id.* ¶ 24).

According to Plaintiffs, the petition to cancel was withdrawn after Kalliste threatened Rule 11 sanctions against Kallista. Friedberg then entered into negotiations with Kalliste for a coexistence agreement, which would ***406** have restricted the use of the KALLISTA mark to a small section of the relevant market. This was allegedly done without informing Kallista. Further, Friedberg sent a "harsh" and factually incorrect demand letter to Kalliste (*id.* ¶ 25).

****337** On June 5, 2014, Defendants informed Kallista that the KALLISTA application was blocked by the KALLISTE trademark registration and recommended that the dispute be resolved through a coexistence agreement. In early July 2014, Friedberg informed Kallista that the Law Firm would give it a credit for up to $7500 of the costs of a coexistence agreement and apologized for "miscommunication" (*id.* ¶ 26). Subsequent efforts to negotiate a coexistence agreement failed.

On August 5, 2014, the Law Firm was relieved of further services by Kallista.

Kallista alleges that, in view of its inability to trademark the KALLISTA mark, it closed its business. Its distributors returned tens of thousands of dollars of KALLISTA products which cannot be sold. Kallista claims it invested over $900,000 in its business operations, which are not recoverable, and lost profits of more than $350,000 for 2014, 2015 and 2016. Parodi claims she lost income of at least $217,000 (*id.* ¶¶ 29–30).

The First Cause of Action is for legal malpractice and is asserted by both Plaintiffs as against both Defendants. It is alleged that Defendants breached a duty of care and skill by, among other things: failing to conduct an adequate trademark search in May 2012; failing to file and prosecute the KALLISTA trademark application in June 2012; failing to inquire into the status of the application and telling Kallista to proceed with sales in February 2013; concealing, until July 24, 2013, that no application had been filed; concealing that an Office Action had been received in November 2013 refusing the KALLISTA application; failing to advise Kallista that the KALLISTE registration posed a serious risk of infringement; delaying for six months a response to the Office Action and then filing a petition to cancel without Kallista's consent and without an adequate investigation. Plaintiffs claim damages of "sunk" costs and expenses of $900,000 to Kallista, $350,000 in lost profits to Kallista, and $234,000 in lost income to Parodi (*id.* ¶¶ 31–37).

The Second Cause of Action is for fraudulent concealment. Plaintiffs claim that there was a conspiracy and "pattern and practice" to cover up and avoid disclosing Defendant's legal malpractice. Plaintiffs assert that Defendants were under a ***407** fiduciary duty to disclose all of their acts and omissions constituting malpractice. The "pattern and practice" of fraudulent concealment is said to include: (a) concealing the failure to fail a trademark application for KALLISTA in February 2013; (b) withholding from Kallista and Parodi in July 2013 that the application had not been filed sooner and that it had only been filed in response to Kallista's inquiry; (c) concealing the receipt of the Office Action; (d) failing to inform Kallista and Parodi that Defendants had filed a petition to cancel the KALLISTE registration based on fraud without telling Kallista in advance and without an adequate investigation; and (e) concealing from Kallista that Defendants had entered into negotiations for a coexistence agreement. Plaintiffs assert that, but for the fraudulent

concealment, they would not have made any agreements with Defendants and would have obtained alternate counsel and taken other measures to mitigate the damages caused by the legal malpractice. Plaintiffs seek $1.4 million damages, including the "sunk costs" of Kallista, the lost profits of Kallista, and the lost income of Parodi. Plaintiffs claim that Defendants' acts were knowing, intentional and were done wantonly with a high degree of moral turpitude (*id.* ¶ ¶ 38–43). Plaintiffs claim punitive damages should be awarded because "Plaintiffs were subjected to a cruel and unjust hardship by which their interests in **338 receiving competent and conflict-free legal advice were brazenly attacked and stolen," and such an award is necessary to punish Defendants and deter them from similar misconduct in the future (*id.* ¶ 44).

The Third Cause of Action is for breach of contract and is asserted as against the Law Firm only. Kallista claims it entered into an agreement for legal services with the Law Firm for legal services and that Parodi is a third party beneficiary of that agreement. In essence, Plaintiffs claim that the Law Firm breached the agreement by failing to provide competent legal services (*id.* ¶ 49).

The Fourth Cause of Action is for violation of Section 487 of the Judiciary Law. Plaintiffs claim that Defendants violated Section 487 by filing and prosecuting a fraud action on behalf of Kallista (the petition to cancel the KALLISTE mark) without informing Kallista or obtaining its consent and without conducting an adequate investigation. This action is said to be part of a larger scheme to mislead Plaintiffs, which persisted for more than a year and which "amounts to an extreme pattern of legal delinquency." It is claimed that, by the filing of the petition to cancel without an adequate investigation, Defendants *408 intended to deceive the Board and also Kallista, Parodi, and Kalliste (*id.* ¶¶ 50–53).

DEFENDANT'S CONTENTIONS IN SUPPORT OF ITS MOTION

In support of the motion, Defendants submit an attorney affirmation and a memorandum of law. The attorney affirmation supplies: (1) the Summons and Complaint; (2) a printout from the Trademark Electronic Search System showing the result of a word search for the mark ELTHERIA on October 2, 2015[2]; and (3) a printed copy of the "About Us web page for the Trademark Trial and Appeal Board for the United States Patent and Trademark Office.[3]

Defendants argue that the Second (fraudulent concealment) and Third (breach of contract) Causes of Action are duplicative of the First Cause of Action (legal malpractice). It is contended that the causes of action are all predicated on nearly identical allegations and all seek the same damages. Defendants contend that there is no cognizable cause of action for fraudulent concealment of legal malpractice. Further, assert Defendants, the punitive damages demand attached to the Second Cause of Action should be dismissed in that Plaintiffs have not alleged that the behavior of Defendants reaches the requisite high level of immorality as to warrant punitive damages. Defendants seek dismissal of the Fourth Cause of Action which is predicated upon Judiciary Law Section 487. According to Defendants, the statute does not apply to conduct committed by an attorney practicing before a federal agency located in Virginia. Nor, say Defendants, does the statute apply to a law firm, as opposed to an individual attorney. Defendants also assert that the Plaintiffs have failed to allege facts **339 sufficient to state a cause of action under the statute.

With regard to Parodi, Defendants argue that she has no standing to maintain the First Cause of Action (legal malpractice) because she was not in privity with Defendants. Similarly, Defendants *409 argue that, for purposes of the Second Cause of Action (fraudulent concealment), any representation that they made to her was not made for the purpose of inducing her to rely upon it, nor would any such reliance be justifiable. Further, say Defendants, they owed her no duty of disclosure as she did not personally retain Defendants. Defendants assert that Parodi cannot maintain a breach of contract action (Third Cause of Action) against the Law Firm because she was not a party to the contract and Plaintiffs do not allege that Parodi was intended to be a beneficiary of the retainer agreement. Parodi, argue Defendants, cannot maintain the Fourth Cause of Action, based on Section 487, because she was not a party to the proceeding in question before the Board.

Defendants also assert that the claimed damages sought under the First Cause of Action (legal malpractice) should be dismissed because they cannot be calculated with reasonable certainty. Defendants contend that the claim for lost profits is speculative as Kallista is a new venture and calculation of such damages would be too speculative. Defendants claim that the alleged "sunk costs" are "inherently incredible" since Kallista does not claim that it could not market its products outside the United States, nor does it allege what the costs of a

coexistence agreement would have been. Further, Defendants assert that Kallista has not alleged why the loss of one trademark caused its entire business to cease entirely.

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition, Plaintiffs submit a memorandum of law. In setting forth the facts upon which Plaintiffs' memorandum relies, Plaintiffs have, in a few instances, gone beyond the boundaries of the Complaint. For one example, Plaintiffs assert that they replaced the Law Firm with Conkle, Kremer & Engel and paid this new firm to continue the negotiations with Kalliste and to file for a new trademark (Plf. Mem. at 8, 9). For another, Plaintiffs argue in their memorandum that Parodi had a "pre-existing relationship with Mr. Friedberg from prior employment and was responsible for contacting and retaining Randy Friedberg to obtain the trademark for Kallista in this matter" (*id.* at 21). No such allegations appear in the Complaint. The Court must rely exclusively on the actual content of the pleading and its fair intendments. Accordingly, the Court has not considered the elaborations and embellishments offered, ***410** without citation to the pleading, in Plaintiffs' memorandum of law.[4]

Plaintiffs argue that their fraudulent concealment cause of action is not duplicative of their legal malpractice claim. They argue that the fraudulent concealment claim is based on additional parts that ****340** were part of a deliberate scheme to try to fix or repair the original legal malpractice of failing to conduct a proper trademark search (Plf. Mem. at 11–12). Plaintiffs state the following in their memorandum of law:

> As soon as White & Williams cleared the term "Kallista" for use and registration, Kallista started investing in the business, creating formulas, creating products, packaging and labeling, obtaining distributors, developing marketing plans, setting up websites and other social media accounts —all of which costs hundreds of thousands of dollars. These investments started in May and June of 2012 and continue through at least August of 2014 when Kallista finds new counsel. The investments from June 2012 to July 2013, or possibly November of 2013, are based on mere negligence or legal malpractice; the investments from July of 2013 or possibly November of 2013 are based on willful and deceptive concealments and misrepresentations. The damages may overlap to a limited degree, but the damages are different. In addition, Linda Parodi would not have left her job in September of 2013, had she known that her company name, the most important asset of the business was in legal jeopardy. Thus her damages arise directly from the concealment, and when she undertakes her employment at Kallista, her salary is expense to Kallista and therefore damages suffered by Kallista (Plf. Mem. at 12).

The Court notes that most of these assertions are not contained in Plaintiffs' pleading. There is no assertion that ***411** Plaintiffs created formulas (or anything else) after the name was "cleared" by the Law Firm. Nor is there any assertion as to when any investments were made by Kallista nor that Parodi was paid a salary by Kallista and the amount thereof.

In any event, Plaintiffs contend that their Second Cause of Action contains more than just a mere failure to disclose malpractice, pointing to the failure to disclose the Office Action and the failure to disclose the filing of a petition to cancel the Kalliste registration (Plf. Mem. at 13).

Plaintiffs argue that the claim for punitive damages is well plead and that what happened to them is "outrageous" which reflects a wanton disregard of their rights (Plf. Mem. at 15).

Plaintiffs assert that Section 487 of the Judiciary Law applies to activities which take place outside the State of New York and that Section 487 should be read to impose liability on an entire law firm, not just individual attorneys.

Plaintiff Parodi argues that she has standing to sue because she is the co-founder and general manager of Kallista, a firm owned by her husband. She contends that she has standing because there is, or should be, an exception to privity based on fraud, **collusion** or special circumstances, and because the misconduct was directed towards her.

As to damages, Plaintiffs assert that their out-of-pocket costs (or sunk costs) are inherently credible and real and that the issue of damages should not be decided in the context of a motion to dismiss (Plf. Mem. at 24–25).

DEFENDANTS' REPLY

In reply, Defendants submit an affidavit from Randy Friedberg to which he attaches: (a) a chain of emails between him and Parodi of March 30, 2012; (b) a chain of emails between him and George Frantzis (a person who appears to be making inquires on behalf of Kallista) of February 25, 2013; and (c) what he describes as a chain of emails

between him and George ****341** Frantzis on July 25, 2013 (on which Parodi was copied). Defendants also submit a reply memorandum of law.

The emails are offered to support Defendants' argument in their reply memorandum (Reply Mem. at 13–14) that Parodi did not, in fact, have a pre-existing relationship with Friedberg, as claimed in Plaintiffs' memorandum of law, and that communications regarding the status of the trademark application were ***412** between Friedberg and Frantzis, not Friedberg and Parodi. But, again, since Defendants did not move to dismiss based on documentary evidence and the allegations that Plaintiffs made in their opposition memorandum will be disregarded to the extent not contained in the Complaint, the Court will not consider the assertions in the Friedberg affidavit.

Defendants' reply memorandum of law otherwise seeks to rebut the arguments advanced by Plaintiffs in their opposition memorandum. The Courts notes that Defendants point out that Plaintiffs did not specifically address Defendants' argument that the contract cause of action is duplicative of the legal malpractice action.

STANDARD OF REVIEW ON A MOTION TO DISMISS

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss, the sole criterion is whether the pleading states a cause of action (*Cooper v. 620 Prop. Assoc.*, 242 A.D.2d 359, 661 N.Y.S.2d 1001 [2d Dept.1997], *citing Weiss v. Cuddy & Feder*, 200 A.D.2d 665, 606 N.Y.S.2d 766 [2d Dept.1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 773 N.E.2d 496 [2002]; *Cooper*, 242 A.D.2d at 360, 661 N.Y.S.2d 1001). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts' " (*id., quoting 219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp.*, 98 N.Y.2d at 152, 746 N.Y.S.2d 131, 773 N.E.2d 496). A plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, a plaintiff will not be penalized for not making an evidentiary showing in support of the complaint (*Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 351, 961 N.Y.S.2d 364, 985 N.E.2d 128 [2013]; *Kempf v. Magida*, 37 A.D.3d 763, 832 N.Y.S.2d 47 [2d Dept.2007]; *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635–636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976])

****413 THE THIRD CAUSE OF ACTION—FOR BREACH OF CONTRACT—SHOULD BE DISMISSED AS DUPLICATIVE OF THE FIRST CAUSE OF ACTION FOR LEGAL MALPRACTICE***

The Third Cause of Action alleges that the Law Firm breached its contract with Plaintiffs by: failing to conduct an adequate ****342** trademark search in May 2012 and failing to discover the existence of the KALLISTE mark; failing to timely file and prosecute the KALLISTA trademark application; failing to conduct a reasonable inquiry into the status of the KALLISTA trademark application; failing to conduct a competent trademark search in July 2013; concealing the receipt of the Office Action refusing the KALLISTA application; waiting six months to respond to the Office Action and then filing a petition to cancel the KALLISTE registration; and undertaking an unauthorized negotiation for a coexistence agreement (Complaint, ¶ 48). Each of these allegations is also asserted in the context of the First Cause of Action for legal malpractice (*id.*, ¶ 33).

[1] **[2]** The breach of contract cause of action is premised on the assertion that the Law Firm "impliedly promised to provide competent legal services to prosecute a trademark application (Complaint, ¶ 46). A breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of a malpractice claim (*see, e.g., Levine v. Lacher & Lovell–Taylor*, 256 A.D.2d 147, 681 N.Y.S.2d 503 [1st Dept.1998]; *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 [1st Dept.1998]). The test is not whether the theory is the same; the test is whether the facts alleged and relief sought are the same (*see Nevelson v. Carro*,

Spanbock, Kaster & Cuiffo, 290 A.D.2d 399, 736 N.Y.S.2d 668 [1st Dept.2002]).

[3] To the extent that the Third Cause of Action for breach of contract arises from the same facts and seeks the same damages as the First Cause of Action for legal malpractice, the Third Cause of Action should be dismissed (*Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P.,* 38 A.D.3d 34, 43, 827 N.Y.S.2d 231 [2d Dept.2006]); *Mecca v. Shang,* 258 A.D.2d 569, 685 N.Y.S.2d 458 [2d Dept.1999], *lv. dismissed* 95 N.Y.2d 791, 711 N.Y.S.2d 158, 733 N.E.2d 230 [2000]).

The facts are the same in both causes of action. There is, however, one aspect of damages that is different. In the Third Cause of Action, Plaintiffs seek recovery for monies that they paid for purported legal services pursuant to the agreement (Complaint, ¶ 49). However, since the purpose of pecuniary damages ***414** in a legal malpractice action is to make the injured party whole, there is no reason to doubt that Plaintiffs may obtain recovery from Defendants for any fees paid that Defendants did not earn due to their malpractice (*Mecca v. Shang,* 258 A.D.2d at 570, 685 N.Y.S.2d 458; *see Leach v. Bailly,* 57 A.D.3d 1286, 1289, 870 N.Y.S.2d 138 [3d Dept. 2008]). Since there is no distinction between the damages recoverable in legal malpractice and those sought in breach of contract, the Third Cause of Action **shall** [x] be dismissed.

THE SECOND CAUSE OF ACTION—FOR FRAUDULENT CONCEALMENT—SHOULD BE DISMISSED

[4] The Second Cause of Action for fraudulent concealment should also be dismissed. A fraud cause of action, like a contract cause of action, that arises from the same facts as a legal malpractice cause of action is duplicative of the legal malpractice cause of action unless distinct damages are alleged (*see, e.g., Postiglione v. Castro,* 119 A.D.3d 920, 990 N.Y.S.2d 257 [2d Dept.2014]; *Rupolo v. Fish,* 87 A.D.3d 684, 928 N.Y.S.2d 596 [2d Dept.2011]); *Financial Servs. Veh. Trust v. Saad,* 72 A.D.3d 1019, 900 N.Y.S.2d 353 [2d Dept.2010]); *Sitar v. Sitar,* 50 A.D.3d 667, 854 N.Y.S.2d 536 [2d Dept.2008]; *Iannucci* ****343** *v. Kucker & Bruh, LLP,* 42 A.D.3d 436, 840 N.Y.S.2d 373 [2d Dept.2007]).

[5] Here, Plaintiffs argue that the fraudulent concealment cause of action is different from their legal malpractice claims because, they say, the fraudulent concealment claim is based on the "additional facts" that Defendants engaged in a plan to "fix" the malpractice while also concealing it (Plf. Mem. at 4, 10). However, Plaintiffs, in fact, alleged the Defendants attempted to fix the alleged malpractice while concealing it from Defendants as part and parcel of their legal malpractice cause of action (see Complaint, ¶ 33[e-j]). Since the fraudulent concealment cause of action is based on the same facts as alleged as part of the legal malpractice claim, it fails unless distinct damages are alleged.

In an effort to argue that the damages claimed under the fraudulent concealment claim are distinct from those claimed in the legal malpractice cause of action, Plaintiffs argue, in their memorandum, that as soon as the Law Firm "cleared" the KALLISTA mark for use and registration, Kallista began to invest in the business, starting in May and June 2012 and continuing through August 2014. Plaintiffs say: "The investments from June 2012 to July 2013 or possibly November 2013 are based on mere negligence or legal malpractice: the investments ***415** from July of 2013 or possibly November of 2013 are based on willful and deceptive concealments and misrepresentations. The damages may overlap to a limited degree, but the damages are different" (Plf. Mem. at 12). The Court disagrees.

As previously noted, Plaintiffs' memorandum of law is not supported by their own pleading. In the fraudulent concealment cause of action, Plaintiffs set forth two paragraphs directed to compensatory damages.

The first paragraph relating to compensatory damages contains the assertion that, but for the fraudulent concealment, they would not have continued to do business with Defendants, would have obtained other attorneys, and taken other unspecified steps to minimize the damages sustained by reason of the legal malpractice alleged (Complaint, ¶ 41). However, this assertion does not actually allege that they sustained any damages other than the unmitigated damages claimed under the legal malpractice cause of action.

The second paragraph relating to compensatory damages states:

> By virtue of the fraudulent concealments, Plaintiffs have sustained actual damages in excess of $1.4 million, including the sunk costs in the Kallista business, the lost income of Parodi, and the lost anticipated profits from the Kallista business (Complaint, ¶ 42).

Thus, the only compensatory damages mentioned as following from fraudulent concealment are the very same damages as alleged in the cause of action for legal malpractice: (a) "sunk" costs of $900,000 (Complaint, ¶ 35); (b) lost profits of Kallista of $350,000 (Complaint, ¶ 36); and (c) Parodi's loss of income of $234,000, incurred by leaving her prior employment (Complaint, ¶ 37). Rather than being distinct from the damages asserted for legal malpractice, the damages asserted for fraudulent concealment are the same.

Plaintiffs' reliance on *Johnson v. Proskauer Rose LLP,* 129 A.D.3d 59, 9 N.Y.S.3d 201 (1st Dept.2015) is misplaced. That case involved claims by clients of legal malpractice and fraud in connection with a tax avoidance scheme that law firm solicited the clients to participate in and, it turned out, the law firm had a financial interest in, with the law firm disclosing only that it had representing the tax planning ****344** firm in the past in unrelated matters. As the First Department noted, the fraud claim ***416** "was supported by allegations that ... [the attorneys] made affirmative statements touting a tax avoidance plan that they had no genuine basis to represent would be an effective one, as well as their failure to apprise plaintiffs of the fact that the [law firm] was effectively in a business partnership with [the tax planning firm] and a direct financial interest in plaintiffs' purchasing the services being offered by [the tax planning firm]" (129 A.D.3d at 64, 9 N.Y.S.3d 201). In addition, the plaintiffs claimed that the fraud was widespread, with the firm having issued 380 opinion letters to other clients, and sought damages for fraud consisting of the monies (taxes, penalties and interest) paid to the IRS and the loss of income resulting from their decisions to sell stock at the urging of defendants (129 A.D.3d at 64–67, 9 N.Y.S.3d 201).

In *Johnson,* the legal malpractice claim was time-barred. However, the fraud claim was not time-barred and was distinct from the legal malpractice claim because the fraud was claimed to have commenced at the outset, with the law firm's paramount concern being the preservation of its lucrative relationship with the tax planning firm. Here, there is no claim that Defendant engaged in fraud from the onset of the relationship. Moreover, there is no claim here, as there was in Johnson, of specific, affirmative misrepresentations. And here, the damages alleged are the same; in *Johnson,* the damages claimed for fraud were for "far more money" than for legal malpractice (129 A.D.3d at 70, 9 N.Y.S.3d 201).[5]

Burke, Albright, Harter & Rzepka LLP v. Sills, 83 A.D.3d 1413, 919 N.Y.S.2d 731 (4th Dept.2011), also relied upon by Plaintiffs, is distinguishable in that the Court held only that proposed fraud and breach of fiduciary duty counterclaims were not patently lacking in merit for the purposes of allowing them to be asserted in an amended pleading and, further, the defendants offered evidence in support of those allegations.

[6] There is yet a further reason for dismissal of the Second Cause of Action as to Kallista, which was a client of Defendants. It is well settled that there is no independent cause of action for "concealing" malpractice (*Weiss v. Manfredi,* 83 N.Y.2d 974, 616 N.Y.S.2d 325, 639 N.E.2d 1122 [1994], *rearg. denied* 84 N.Y.2d 848, 617 N.Y.S.2d 134, 641 N.E.2d 155 [1994]; ***417** *Zarin v. Reid & Priest,* 184 A.D.2d 385, 585 N.Y.S.2d 379 [1st Dept.1992]). Thus, to the extent that Plaintiffs are complaining in the Second Cause of Action that Defendants fraudulently concealed their alleged malpractice, their claim cannot stand. Stripped of this, the only remaining aspect of the Second Cause of Action is that Defendants attempted to fix or repair their malpractice by taking certain actions, such as attempting to cancel the KALLISTE registration and negotiating for a coexistence agreement. But these alleged actions on the part of Defendants are also alleged as part of the malpractice claim.

With regard to Parodi, since, as will be discussed *infra,* she lacks standing to maintain a legal practice action against Defendants, it cannot be fairly said that the fraudulent concealment claim is duplicative of a malpractice cause of action. ****345** But her cause of action fails for other reasons.

[7] A cause of action to recover damages for fraudulent concealment requires, in addition to scienter, reliance and damages, a showing that there was a fiduciary or confidential relationship between the parties which would impose a duty on the defendant to disclose material information and that the defendant failed to do so (*see, e.g., Consolidated Bus Tr., Inc. v. Treiber Group, LLC,* 97 A.D.3d 778, 779, 948 N.Y.S.2d 679 [2d Dept.2012]). The Second Cause of Action is entirely barren of any allegation that Defendants had a duty to disclose material information to Parodi (*see, e.g., E.B. v. Liberation Publs., Inc.,* 7 A.D.3d 566, 777 N.Y.S.2d 133 [2d Dept.2004]) or any facts that would support the imposition of such a duty (*see, e.g., Sanford/Kissena Owners Corp. v. Daral Properties, LLC,* 84 A.D.3d 1210, 923 N.Y.S.2d 692 [2d Dept.2011]).

Accordingly, the Second Cause of Action shall be dismissed.[6]

THE FOURTH CAUSE OF ACTION—BASED ON SECTION 487 OF THE JUDICIARY LAW—SHOULD BE DISMISSED

Section 487 of the Judiciary Law provides, in relevant part, that an attorney who "[i]s guilty of any deceit or **collusion**, or consents to any deceit or **collusion**, with intent to deceive the court or any party" is guilty of a misdemeanor and, in addition to the punishment for such crime, forfeits to treble damages to the injured party, recoverable in a civil action.

[8] ***418** The statute provides for a cause of action against an attorney in two circumstances: (a) where the alleged deceit or **collusion** with the intent to deceive any part occurred in a pending judicial proceeding; or (b) where deception is directed against a court and the deception relates to either a prior judicial proceeding or one which may be commenced in the future (*see, e.g., Singer v. Whitman & Ransom,* 83 A.D.2d 862, 442 N.Y.S.2d 26 [2d Dept.1981]). This statutory construction dates back to the 1884 decision of the Court of Appeals in *Looff v. Lawton,* 97 N.Y. 478, 482 (1884), where in construing the predecessor statute, the Court stated:

> The "party" referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court.

[9] Thus, to make out a claim under the statute the deceit complained of must have occurred during a judicial proceeding to which the plaintiff was a party (*Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro,* 187 A.D.2d 384, 590 N.Y.S.2d 201 [1st Dept.1992]); *accord, Henry v. Brenner,* 271 A.D.2d 647, 706 N.Y.S.2d 465 [2d Dept.2000]; *Beshara v. Little,* 215 A.D.2d 823, 626 N.Y.S.2d 310 [3d Dept.1995]). Thus, the alleged creation of a false affidavit in support of an insurance claim was not within the statute since the affidavit was not filed in support of a pending lawsuit (*Gelmin v. Quicke,* 224 A.D.2d 481, 638 N.Y.S.2d 132 [2d Dept.1996] [that the affidavit was produced in response to discovery demands by plaintiff did not bring the affidavit within the statute]).

[10] Here, in the Fourth Cause of Action, Plaintiffs allege that Defendants violated Section 487 "by filing and prosecuting a fraud action on behalf of Kallista (the ****346** Petition to Cancel against Kalliste), without informing Kallista or obtaining its consent, and without conducting an adequate investigation of the merits of the claim." Plaintiffs contend that this was part of a bigger plan to mislead them which amounts to an extreme pattern of delinquency. Plaintiffs allege that by filing the petition, Defendants intended to deceive the Board, Kallista, Parodi and Kalliste.

The petition to cancel the KALLISTE registration was not brought before a court. It was brought before an administrative agency, the United States Trademark Trial and Appeal Board, which is part of the United States Patent and Trademark Office, a ***419** federal agency within the United States Department of Commerce (35 U.S.C. § 1; 15 U.S.C. § 1067).[7]

There is no authoritative precedent for construing Section 487 to impose liability for deceit committed in the course of an administrative proceeding.[8]

[11] The Court concludes that Judiciary Law Section 487 does not apply to the filing of a petition with an administrative agency, whether state or federal. Section 487 is a unique statute deriving from a statute of ancient origin in the criminal law (*see Amalfitano v. Rosenberg,* 12 N.Y.3d 8, 14, 874 N.Y.S.2d 868, 903 N.E.2d 265 [2009]). It is intended to regulate, through criminal and civil sanctions, the practice of law in the courts and to protect the integrity of the truth-seeking process of the courts (*see Schertenleib v. Traum,* 589 F.2d 1156, 1166 [2d Cir.1978]).

There is a genuine debate as to whether the court proceedings reached by Section 487 are limited to proceedings in New York state courts or extend further to court proceedings in other places (*compare Schertenleib v. Traum,* 589 F.2d at 1166; *Alliance Network, LLC v. Sidley Austin LLP,* 43 Misc.3d 848, 987 N.Y.S.2d 794 [Sup.Ct., N.Y. County 2014]; *Cinao v. Reers,* 27 Misc.3d 195, 893 N.Y.S.2d 851 [Sup.Ct., Kings County 2006]). However, the statute specifically provides criminal and civil sanctions for deception upon the "court". Doubtless, the statute was enacted before the advent of extensive use of administrative tribunals to adjudicate administrative matters. However, the statute has never been amended to include administrative tribunals. Administrative tribunals are not themselves courts.

It would be an undue construction of the statute to read it so expansively as to bring administrative tribunals within its reach. If the statute were so read, then the statute could be found to reach a multitude of agencies, ranging from federal agencies, to state agencies, to municipal agencies. Further,

it is not always necessary for a person who represents a party before an agency to be an attorney; indeed, admission to practice as an attorney may not itself be sufficient to qualify a person to represent a party before an administrative agency. *420 Whether the statute is to be expanded to cover deception before administrative agencies, and if so, whether such coverage should be limited to attorneys, are matters for the Legislature.

[12] The statute is best analyzed in the criminal law context and not within the framework of comparable civil torts (*see* **347 *Amalfitano v. Rosenberg,* 12 N.Y.3d at 14, 874 N.Y.S.2d 868, 903 N.E.2d 265). In the criminal law, where two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity (*People v. Golb,* 23 N.Y.3d 455, 468, 991 N.Y.S.2d 792, 15 N.E.3d 805 [2013], *rearg. denied* 24 N.Y.3d 932, 993 N.Y.S.2d 543, 17 N.E.3d 1139, *cert. denied* —— U.S. ——, 135 S.Ct. 1009, 190 L.Ed.2d 839 [2015]). Thus, even if it is assumed that it is equally plausible to construe "court" as used in Section 487 to include an administrative tribunal as it is to exclude an administrative tribunal, the latter construction should be preferred.

[13] Further, specifically addressing the facts in this case, the United States Patent and Trademark Office is empowered to regulate and govern the recognition and conduct of "agents, attorneys or other persons representing applicants or other parties before the Office" (35 U.S.C. § 2[b][2][D]). A person who practices before the Office need not be a member of the New York Bar, though if he or she is a member of the New York Bar, he or she is subject to discipline by the New York authorities (*Kroll v. Finnerty,* 242 F.3d 1359, 1365–1366 (Fed.Cir.2001). But this Court sees no valid basis in the history of the statute, or in the precedents applying it, for construing the statute as imposing criminal and civil liabilities upon an attorney who engages in deceit before this federal agency.

For these reasons, the Fourth Cause of Action shall be dismissed. In view of this determination, it is not necessary to reach the question whether the Law Firm may be held liable under Section 487.[9]

THE FIRST CAUSE OF ACTION SHOULD BE DISMISSED INSOFAR AS BROUGHT BY LINDA GILLETTE PARODI

Defendants maintain that Parodi lacks standing to sue them for legal malpractice because she lacks privity with them. In this regard, the Complaint alleges that an agreement for legal *421 services was entered into between Kallista, Etheria and the Law Firm (Complaint at ¶ 13). There is no claim that Parodi retained the Law Firm or Friedberg.

Insofar as Parodi is concerned, the Complaint alleges that she was a "co-founder" of Kallista (Complaint, ¶ 1), which was formed in 2012, and that she managed Kallista with her husband, who is the owner of Kallista (*id.* ¶ 11). According to the Complaint, at the time the Law Firm was retained in May 2012, Friedberg was aware that Parodi intended to leave her existing employment once the Kallista business became operational (*id.* ¶ 14). It is alleged that, in or about September 2013, Parodi resigned from her employment with Proctor & Gamble to help manage Kallista's business and that, while at Proctor & Gamble, she earned a salary in excess of $250,000 CHF and a generous benefits package (*id.* ¶ 21). She claims a loss of this income (*id.* ¶ 30). While the First Cause of Action alleges that Defendants owed both Plaintiffs a duty use the degree of skill and care that is possessed by ordinary attorneys, there are no additional or further allegations as to why such a duty was owed to Parodi (*id.* ¶ 32).

348 In opposition to the motion, Parodi relies upon *Good Old Days Tavern, Inc. v. Zwirn,* 259 A.D.2d 300, 686 N.Y.S.2d 414 (1st Dept.1999), *lv. and rearg. denied* 261 A.D.2d 288, 691 N.Y.S.2d 759 (1999) where the Appellate Division held that, while privity of contract is generally necessary to state a cause of action for attorney malpractice, liability is extended to third parties, not in privity, for harm caused by professional negligence where there is fraud, **collusion, malicious acts or other special circumstances. In *Good Old Days Tavern,* the appellate court ruled that there were special circumstances present in that the individual plaintiff had a relationship with the defendant attorney "tantamount to one of contractual privity" (*id.*). The Court explained: "Indeed, plaintiff Day was for all intents and purposes a foreseeable third-party beneficiary of the contract pursuant to which he retained defendant attorney Zwirn to represent Good Old Days Tavern, Inc., of which Day was the president and sole shareholder and from which business he derived his livelihood" (*id.*).

[14] The present case is a far cry from *Good Old Days Tavern.* Parodi is not an owner of Kallista at all, let alone the sole owner. She is not claimed to be an officer. Nor is it claimed that, prior to September 2013, she derived her

livelihood from Kallista. Rather, the Complaint alleges that Kallista retained the Law Firm in or about May 2, 2012 and that, at the time of ***422** the retention, Parodi was employed as a senior executive in an unrelated entity. While it is true that the Complaint alleges that Friedberg was aware that Parodi intended to join Kallista when its business became operational, the fact remains that, unlike *Good Old Days Tavern,* Parodi is not claimed to have retained Defendants on Kallista's behalf and, further, Parodi was not even an employee at the time of such retention.

There is no claim that Parodi herself ever requested that Defendants give her any legal advice or give her any information as to the status of the Kallista trademark application. Indeed, even if such an allegation had been made, it would not, by itself, give rise to a "near privity" relationship sufficient to extend liability for malpractice to a non-client (*see Leggiadro, Ltd. v. Winston & Strawn, LLP,* 119 A.D.3d 442, 988 N.Y.S.2d 493 [1st Dept.2014]). There are simply no facts alleged that would make it foreseeable that Parodi was a third-party beneficiary of a contract made by the Law Firm with Kallista, a company which Parodi was not an owner, officer or employee (*see Topor v. Enbar,* 15 Misc.3d 1139[A], 2007 WL 1501647 [Sup.Ct., N.Y. County 2007]).[10]

Accordingly, the First Cause of Action for malpractice shall be dismissed insofar as asserted by Parodi.

PLAINTIFF KALLISTA'S CLAIM FOR LOST PROFITS SHOULD BE DISMISSED

Defendants argue that Kallista's claims to recover for business-cessation or lost profits should be dismissed from the First Cause of Action as not ascertainable with reasonable certainty. The Court agrees.

[15] **[16]** To state a cause of action for legal malpractice, a plaintiff must plead actual, ascertainable damages resulting from the attorney's negligence; conclusory or speculative allegations of damages are ****349** insufficient. However, a plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It is sufficient if plaintiff pleads allegations from which damages attributable to defendant's malpractice might reasonably be inferred (*Randazzo v. Nelson,* 128 A.D.3d 935, 9 N.Y.S.3d 394 [2d Dept.2015]; *Rock City Sound, Inc. v. Bashian & Farber, LLP,* 74 A.D.3d 1168, 903 N.Y.S.2d 517 [2d Dept.2010], *lv. dismissed* 16 N.Y.3d 826, 921 N.Y.S.2d 186, 946 N.E.2d 175 [2011]).

[17] ***423** Kallista claims as damages for legal malpractice lost profits of $350,000 (Complaint at ¶ 36), a figure which it asserts is based on its anticipated profits for 2014, 2015 and 2016 (*id.*¶ 29).

However, Kallista also alleges that it was preparing to launch its skin care product line in the first calendar quarter of 2014 and was in the process of signing up distributors and developing products using the KALLISTA mark (Complaint, ¶ 19). There is no allegation that Plaintiff was actually selling any products during any period between 2012 (when Kallista was formed) and the first quarter of 2014. There is no allegation as to when Kallista intended to commence actual sales of KALLISTA branded products. Moreover, Kallista appears to concede that it acquired knowledge of the claimed legal malpractice in August, 2014 (*id.* ¶ 28).

Kallista has not set forth any basis, other than the barest conclusions, that it was expecting any profits. There is no assertion as to how many products it expected to sell under the Kallista brand and what it would earn from those products. Moreover, Kallista's own allegations proceed on the basis that Kallista could not market products under the KALLISTA brand without running a significant legal risk of interfering with the KALLISTE mark, which was alleged (apparently by Kalliste) to have been used first in 2008, long before Defendants represented Kallista (Complaint, ¶ 20). Kallista does not allege that had Defendants timely prosecuted the KALLISTA application, the KALLISTA application would have been approved and KALLISTE's application would have been denied. Thus, it appears that Kallista would never have been able to use the KALLISTA mark or, if it did, might still have been subjected to liability, risk, and legal expense, even if Defendants had acted perfectly.

Further, as Defendants point out, Plaintiffs have not addressed in their pleading whether they could market KALLISTA branded products outside the United States and, if they did, what, if anything, they could earn from such sales.

In short, since this was a start-up enterprise, and since Kallista's complaint contains only conclusory allegations regarding lost profits, the lost profit claim should be dismissed (*see, e.g., Nineteen New York Props. Ltd. v. 535 5th Operating Corp.,* 211 A.D.2d 411, 621 N.Y.S.2d 42 [1st Dept.1995]; *Giambrone v. Bank of New York,* 253 A.D.2d 786, 677 N.Y.S.2d 608 [2d Dept.1998]).

[18] The "sunk costs" claim for damages stands, however, on a different footing. It is a fair and reasonable inference from the *424 allegations of the Complaint that Kallista was investing money in its business and, in particular, toward the marketing of products under the KALLISTA brand. It is also fairly and reasonably inferable that at least some of the expenditures and investments in the KALLISTA brand may not have been incurred had Kallista been timely informed there was a significant risk to the use of the KALLISTA name. Although it is true that Kallista has not itemized these expenditures or provided detailed allegations regarding them in its Complaint, it cannot be concluded **350 that Kallista's claim—that certain costs would have been avoided had Defendants timely informed them of the KALLISTE mark—is inherently incredible.

CONCLUSION

It is hereby

ORDERED that the motion of Defendants White & Williams, LLP and Randy Friedberg to dismiss (1) the Second, Third, and Fourth Causes of Action set forth in the Complaint of Plaintiffs Kallista, S.A. and Linda Gillette Parodi; (2) the damage theories alleged in the First Cause of Action set forth in said Complaint; (3) so much of the First Cause of Action set forth in the Complaint as is interposed on behalf of Plaintiff Linda Gillette Parodi, and (4) the demand of said Plaintiffs for punitive damages, is granted in part, and denied in part; and it is further

ORDERED that the branches of said motion as seek to dismiss the Second, Third, and Fourth Causes of Action of said Complaint are granted, and said Causes of Action are hereby dismissed in their entirety; and it is further

ORDERED that the branch of said motion as seeks to dismiss the damage theories set forth in the First Cause of Action of said Complaint is granted to the extent that Plaintiff Kallista, S.A. seeks damages for lost profits, and such lost profit claim is dismissed; and it is further

ORDERED that the branch of said motion as seeks to dismiss so much of the First Cause of Action set forth in the Complaint interposed on behalf of Plaintiff Linda Gillette Parodi is granted, and said Cause of Action is hereby dismissed insofar as asserted by said Plaintiff; and it is further

ORDERED that, except as hereinabove set forth, the said motion is denied.[11]

All Citations

51 Misc.3d 401, 27 N.Y.S.3d 332, 2016 N.Y. Slip Op. 26009

Footnotes

1 The Notice of Motion, tracking the nomenclature of the Complaint, refers to the specific theories of liabilities as "Claims for Relief", using federal court parlance. The Court will deem such references to be to proper state court parlance—"Causes of Action."

2 The point of this submission is to show that, not only do Plaintiffs not complain about the ETHERIA registration, the ETHERIA mark is registered (Def. Mem. at 5). However, Defendants have not moved to dismiss on the basis of documentary evidence and, therefore, this document is not relevant to the motion they made (to dismiss for failure to state a cause of action) and shall be disregarded.

3 The purpose of this submission is to show that the Board is located in Alexandria, Virginia (see Def. Mem. at 11), thus setting the stage for one of Defendants' central arguments—that Judiciary Law Section 487 does not apply out-of-state.

4 The Court has also not considered Plaintiffs' request for leave to amend any allegations found to be insufficient. Plaintiffs did not move, or seek to move, for leave to amend. Further, even though the motion to dismiss had been made prior to the Preliminary Conference, counsel for Plaintiffs did not request the opportunity to interpose an amended complaint at that time. Plaintiffs also have not provided any factual basis for these assertions since Plaintiffs have not offered any affidavits. While Plaintiffs, as will be discussed herein, are entitled to rely on their pleading and need not submit affidavits, they cannot simply make assertions in their memorandum of law that they did not make in their Complaint.

5 Plaintiffs' reliance on *Dischiavi v. Calli*, 68 A.D.3d 1691, 892 N.Y.S.2d 700 [4th Dept.2009], *rearg. denied* 71 A.D.3d 1548, 1549, 896 N.Y.S.2d 277 (2010) is misplaced for the same reason. There, the Court found that the plaintiffs had alleged the fraud caused additional damages, separate and distinct from those generated from the alleged malpractice. That is not the case here.

6 Since the Second Cause of Action is being dismissed, and the punitive damages claim is part of that Cause of Action, the Court need not address whether, if there were a viable fraud claim, punitive damages would be available.

7 The Court is required to take judicial notice of federal laws (CPLR 4511[a]).

8 In one case, a federal court dismissed, on the merits, a claim of deceit predicated upon a statement made by counsel to an arbitration panel, without addressing the question whether an arbitration panel is a court for purposes of Judiciary Law Section 487 (*see Tedeschi v. Smith Barney, Harris Upham & Co.*, 548 F.Supp. 1172, 1176 [S.D.N.Y.1982]).

9 Given the criminal law origins of the statute, the usual rules of vicarious liability followed in civil cases may not be applicable (*see Polanco v. NCO Portfolio Mgt., Inc.*, 23 F.Supp.3d 363, 376–377 [S.D.N.Y.2014]; *Dupree v. Voorhees*, 25 Misc.3d 451, 883 N.Y.S.2d 454 [Sup.Ct., Suffolk County 2009], *mod.* 68 A.D.3d 810, 891 N.Y.S.2d 422 [2009], *lv. denied* 15 N.Y.3d 705, 2010 WL 3430811 [2010]; *but see Moormann v. Perini & Hoerger*, 65 A.D.3d 1106, 886 N.Y.S.2d 49 [2d Dept.2009]).

10 Parodi's reliance on *AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co.*, 5 N.Y.3d 582, 595, 808 N.Y.S.2d 573, 842 N.E.2d 471 (2005) is misplaced in that, it was held that plaintiff had failed to set forth the applicability of any exceptions to the rule requiring privity for the maintenance of an attorney malpractice action.

11 Counsel are reminded that the Court expects that discovery will be completed by the Trial Readiness Conference scheduled for May 6, 2016.

End of Document

Matter of Abu-Regiaba

Surrogate's Court of New York, Nassau County

September 30, 2008, Decided

346038

Reporter
21 Misc. 3d 1106(A); 873 N.Y.S.2d 231; 2008 N.Y. Misc. LEXIS 5802; 2008 NY Slip Op 51986(U); 240 N.Y.L.J. 72

In the Matter of the Probate of the Last Will and Testament of Sabih Abu-Regiaba, Deceased

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

vacate, stipulation of settlement, decedent's, renunciation, beneficiary, probate

Headnotes/Syllabus

Headnotes

[*1106A] [231]** Stipulations--Setting Stipulation Aside. Wills--Renunciation. Estates, Powers and Trusts Law--§ 2-1.11 (Renunciation of property interests).

Counsel: **[***1]** For Dhamya Hussain, Petitioner: John M. McFaul, Esq., oyster Bay, NY.

For Adam Regiaba & Debbie Abu-Regiaba, respondents: Mazur, Carp & Rubin, Esq., New York, NY.

For Adam Regiaba, respondent: Freedman Fish Grimaldi, New York, NY.

For Petitioner: Gary B. Schreiner, Esq., Oyster Bay.

Judges: JOHN B. RIORDAN, Judge of the Surrogate's Court.

Opinion by: JOHN B. RIORDAN

Opinion

John B. Riordan, J.

In this probate proceeding, petitioner, by motion filed on May 28, 2008, seeks an order vacating a stipulation of settlement and a renunciation and disclaimer purportedly executed to effectuate the settlement.

Decedent was survived by his spouse (petitioner) and two children of a prior marriage, Adam Abu-Regiaba and Debbie Abu-Regiaba (respondents).

Petitioner filed a petition for probate of an instrument dated June 8, 2005 and preliminary letters issued to her. Decedent's son appeared by counsel in the probate proceeding and settlement negotiations ensued. The negotiations resulted in a stipulation of settlement dated September 26, 2007 which was "so ordered" on November 29, 2007. The settlement provided that the assets of the "Charles Schwab & Co. Keogh Plan" be divided into three equal parts: 1/3 to the spouse, 1/3 to Debbie **[***2]** Abu-Regiaba and 1/3 to Adam Abu-Regiaba in trust. The will had provided that the Charles Schwab & Co. Keogh Plan be distributed 2/3 to petitioner, decedent's wife, and one-third to decedent's daughter, Debbie. The will further provided that the residue of the estate was to be divided 65% to the wife, 25% to the daughter, and 10% to the decedent's sister.

Decedent did not designate a beneficiary for the Schwab plan. Under the terms of the plan, petitioner became the beneficiary by default. Petitioner alleges that at the time of the execution of the stipulation she did not know that she was the beneficiary of the plan but believed instead that the estate was the beneficiary. Petitioner alleges that on October 18, 2007 her attorney made inquiries with Charles Schwab to determine the terms of the plan and that prior to receiving a response from Charles Schwab, she executed the renunciation of any interest in excess of 1/3 of the assets. It is petitioner's position that she would not have consented to an equal division of the assets of the plan had she known that she was the beneficiary.

Respondents oppose the motion to vacate the stipulation alleging that (1) the agreement reflects the

intention [***3] of the parties (2) the designation of the petitioner as beneficiary under the plan was irrelevant as petitioner agreed to divide testamentary and non-testamentary assets in three equal parts and (3) petitioner, as preliminary executrix, had access to the financial records of decedent and could have obtained and reviewed the terms of the plan prior to execution of the stipulation. Further, respondents contend that the renunciation executed by petitioner is irrevocable.

A contract entered into under mutual mistake of fact is voidable and subject to rescission (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446, 616 N.E.2d 142, 599 N.Y.S.2d 787 [1993]*) if the mistake exists at the time the contract was negotiated (*Matter of New York Agency and other Assets of Bank of Credit & Commence Int'l, 90 NY2d 410, 683 N.E.2d 756, 660 N.Y.S.2d 850 [1997]* and the mistake is substantial, resulting in an absence of the requisite "meeting of the minds" (*County of Orange v Grier, 30 AD3d 556, 817 N.Y.S.2d 146 [2d Dept. 2006]*). To entitle a party to rescission, the contract must rest upon the assumption of a fact as to which the parties were mistaken. A stipulation of settlement is an independent contract and the same standard applies to a motion to vacate [***4] a stipulation of settlement based upon a mutual mistake (*Hannigan v Hannigan, 50 AD3d 957, 857 N.Y.S.2d 201 [2d Dept 2008]*).

Petitioner's attorney, in a supplemental affidavit, now advances a different theory in support of the motion. It is now petitioner's position that the stipulation of settlement can be vacated without the necessity of establishing a mistake of fact.

Petitioner contends that the standard to be applied, where a final decree has not been signed, is whether the parties can be restored to the "status quo" (*citing Matter of Frutiger, 29 NY2d 143, 272 N.E.2d 543, 324 N.Y.S.2d 36 [1971]*). Petitioner's reliance on *Frutiger* is misplaced as the case does not stand for the proposition that a stipulation of settlement can be vacated without any underlying basis. In addition, the fact that a decree admitting the will to probate has not been signed is not determinative. The stipulation of settlement was "so ordered." It is both a contract and an order and can be set aside only upon a showing of fraud, collusion, mistake or such other factors as are sufficient to invalidate a contract (*Living Arts v Kazuko Hillyer Intern., 166 AD2d 284, 564 N.Y.S.2d 111 [1st Dept 1990]*).

Petitioner contends that the failure to vacate the stipulation of settlement [***5] would result in an injustice. Unjust enrichment is a factor to be considered on a motion to vacate a stipulation of settlement (*Weissman v Bondy & Schloss, 230 AD2d 465, 660 N.Y.S.2d 115 [1st Dept 1997]*).

Respondents contend that petitioner's lack of knowledge was the result of negligence and her ignorance cannot be used as a ground to set aside the stipulation. A party bears the risk of a mistake when he is aware, at the time a contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient (*Restatement [Second] of Contracts § 154*). A party cannot rely upon her ignorance of a condition which she could have discovered using ordinary care (*P.K. Development, Inc. v Elvem Development Corp., 226 AD2d 200, 640 N.Y.S.2d 558 [1st Dept 1996]*; *Vandervort v Higginbotham, 222 AD2d 831, 634 N.Y.S.2d 800 [3d Dept 1995]*). In *Matter of Ham* (N.Y.L.J., May 15, 2002 at 22, col. 3) the court denied an application by the co-administrator of decedent's estate to reform a stipulation of settlement which provided for a distribution of the decedent's probate and non-probate assets after she later discovered that one of the non-probate assets was a Totten trust for her benefit, [***6] finding that her failure to ascertain the beneficiary designation on the largest of the decedent's bank accounts could only be ascribed to negligence. The same result should obtain here, where the surviving spouse/preliminary executor was in a position to ascertain the beneficiary designation of the Keogh account and either failed to make the necessary inquiry, or did so and chose to enter into the stipulation without waiting for the answer to that inquiry.

This court has recognized that "[s]tipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process" (*Matter of Siegel*, 5 Misc 3d 1017[A], 799 N.Y.S.2d 164, 2004 NY Slip Op 51414[U] [Sur Ct, Nassau County 2004], *aff'd 29 AD3d 914, 814 N.Y.S.2d 548 [2d Dept. 2006]*). Also, stipulations are especially favored where, as here, the parties have been represented by counsel (*Matter of Stark, 233 AD2d 450, 650 N.Y.S.2d 608 [2d Dept. 1996]*). The court finds no basis upon which to vacate the stipulation of settlement and the motion for that relief is therefore denied.

Even if a basis to vacate the stipulation did exist, vacating the stipulation would not achieve the result the movant seeks in any event. As indicated, the movant also seeks an order vacating [***7] the renunciation and disclaimer which she filed. A renunciation is irrevocable

once properly served and filed (EPTL 2-1.11[g]). As this court held in *Matter of Munch (125 Misc 2d 610, 480 N.Y.S.2d 95 [Sur Ct, Nassau County 1984])*, when the Legislature enacted EPTL 2-1.11, it obviously intended that renunciations be unquestionably irrevocable. This was done to ensure that renunciations under EPTL 2-1.11 would constitute qualified disclaimers for federal estate tax purposes. That being the case, the court declines to set a precedent which may have unintended and extremely adverse consequences to the estates of decedents having nothing to do with the instant controversy.

Accordingly, the motion to vacate the stipulation and the renunciation is denied in its entirety.

Settle order.

Dated: September 30, 2008

JOHN B. RIORDAN

Judge of the

Surrogate's Court

Da Silva v. Musso

Court of Appeals of New York

September 10, 1981, Argued ; October 20, 1981, Decided

No Number in Original

Reporter
53 N.Y.2d 543; 428 N.E.2d 382; 444 N.Y.S.2d 50; 1981 N.Y. LEXIS 3054

Leon Da Silva, Appellant, v. Antonio Musso et al., Respondents

Prior History: Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 16, 1980, which (1) reversed, on the law and the facts, a judgment of the Supreme Court awarding plaintiff specific performance, entered in Queens County upon a decision of the court at a Trial Term (Angelo Graci, J.), and (2) dismissed the complaint.

Plaintiff purchaser and defendant sellers entered into a binder agreement for the sale of an apartment building. Among the financial arrangements set out in the binder was a provision that defendants would take subject to a second mortgage on the property. However, a formal contract was never drawn, because defendants subsequently realized that they had agreed, in an unrecorded extension of subject second mortgage, that the sale of the premises by defendant mortgagors within five years from the date of the extension agreement would accelerate their obligation on the entire outstanding balance, which five-year period had not expired. The closing was then aborted and the purchaser commenced the present action for specific performance. The Trial Judge held that the binder contained all essential elements and, therefore, constituted a valid contract, and that defendants' unilateral mistake, of which the purchaser had no knowledge, and which resulted from the negligence of defendants, constituted an insufficient basis for rescission. He awarded judgment of specific performance to plaintiff. The Appellate Division agreed with the trial court's conclusion that the binder constituted a sufficient contract, but reversed, holding that the agreement was based on a mutual mistake that the mortgage would remain in effect, that there was no fraudulent intent on the part of the sellers and that their forgetfulness did not call for the drastic remedy sought by plaintiff, since rescission would place plaintiff in *status quo ante*. Accordingly, the Appellate Division dismissed the complaint.

The Court of Appeals reversed and reinstated the Supreme Court judgment, holding, in an opinion by Judge Meyer, that, absent any evidence of hardship upon the seller of real estate resulting from his negligent mistake, or of knowledge of or reason to know of the mistake on the part of the purchasers, it is an abuse of discretion as a matter of law to deny specific performance to the purchaser and dismiss the complaint, and that such a showing of hardship is not presented herein.

Da Silva v Musso, 76 AD2d 879.

Disposition: Order reversed, with costs, and the judgment of Supreme Court, Queens County, reinstated.

Core Terms

specific performance, mortgage, purchaser, defendants', rescission, second mortgage, Contracts, binder, hardship, seller, acceleration clause, extension agreement, acceleration, terms

Case Summary

Procedural Posture

Plaintiff buyer filed an action for specific performance of an agreement to purchase real estate against defendant seller. The trial court entered judgment in favor of buyer. The Appellate Division of the Supreme Court in the Second Judicial Department (New York) reversed the trial court's judgment and buyer sought review.

Overview

Buyer and seller entered into a binder agreement for the sale of an apartment building. A formal contract was

never drawn, because seller subsequently realized that it had agreed, in an unrecorded extension of a second mortgage, that the sale of the property would accelerate seller's obligation on the entire outstanding balance. The closing was then aborted and buyer commenced an action against seller for specific performance. The trial court entered judgment in favor of buyer and the intermediate appellate court reversed the judgment. On review, the court reversed and held that absent any evidence of hardship upon the seller of real estate resulting from seller's negligent mistake, or of knowledge of or reason to know of the mistake on the part of the buyers, it was an abuse of discretion as a matter of law to deny specific performance to the buyer and dismiss the complaint. The court found that the seller failed to establish such a hardship.

Outcome

The court reversed the judgment of the intermediate appellate court.

LexisNexis® Headnotes

Contracts Law > Remedies > Specific Performance

Real Property Law > ... > Contracts of Sale > Enforceability > Mistake

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN1 Absent any evidence of hardship upon the seller of real estate resulting from his negligent mistake, or of knowledge or reason to know of the mistake on the part of the purchaser, it is an abuse of discretion as a matter of law to deny specific performance to the purchaser and dismiss the complaint.

Civil Procedure > Appeals > Standards of Review > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Remedies > Specific Performance

HN2 Where the intermediate appellate court and the trial court disagree in their findings of fact and in consequence on the appropriateness of granting the discretionary remedy of specific performance, the appellate court has the power to review the facts and the exercise of discretion. N.Y. C.P.L.R. 5501(b).

Contracts Law > Remedies > Specific Performance

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN3 The grant or denial of specific performance is a matter of sound judicial discretion, not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Contracts Law > Remedies > Specific Performance

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN4 Denial of specific performance would constitute an abuse of discretion as a matter of law if there is no evidence to sustain the conclusion that requiring it would be a "drastic" or harsh remedy. Specific performance may be denied for mistake even though the mistake is the defendant's own act or omission for which plaintiff is not in the least responsible. However, when the mistake is the result of defendant's own carelessness, not contributed to by conduct of the plaintiff, specific performance will be denied only in a case of considerable hardship, or when plaintiff must himself have been aware of the mistake.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Formation of Contracts > Mistake > General Overview

Real Property Law > ... > Mortgages & Other Security Instruments > Transfers > Due on Sale Clauses

HN5 Under long accepted principles one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Formation of Contracts > Mistake > General Overview

HN6 Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible.

Contracts Law > Defenses > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > Unilateral Mistake

Contracts Law > Formation of Contracts > Mistake > General Overview

Contracts Law > Formation of Contracts > Mistake > Unilateral Mistake

Contracts Law > ... > Enforcement > Duties & Liabilities of Parties > Forgery, Fraud & Mistake

Contracts Law > Remedies > Equitable Relief > General Overview

HN7 Whether the mistake be of one or both parties, the law is that rescission is proper only when the mistake is so material that it goes to the foundation of the agreement. Relief is only appropriate in exceptional situations, where a mistake of both parties upsets the very basis for the contract in such a way as to have a material effect on the agreed exchange of performances. The same requirements apply when a party seeks to avoid a contract for a mistake that he alone made.

Headnotes/Syllabus

Headnotes

Specific Performance -- Contract to Sell Real Property -- Mistake

Specific performance of a contract to sell real property may be denied on the ground of mistake even though the mistake is the defendant's, but when the mistake is the result of defendant's own carelessness, not contributed to by the conduct of the plaintiff, specific performance will be denied only in a case of considerable hardship, or when plaintiff must himself have been aware of the mistake; further, rescission of such a contract is proper only when the mistake was not caused by negligence and is so material that it goes to the foundation of the agreement. Accordingly, where plaintiff agreed to purchase and defendants to sell an apartment building in a binder agreement which set out the financial terms, including a provision that the purchaser would take subject to a second mortgage on the property, but, in preparing the formal contract, the sellers realized that they had previously agreed, in an unrecorded extension of the subject mortgage, that the sale of the premises by defendant mortgagors within five years from the date of the extension would accelerate their obligation on the entire outstanding balance, which five-year period had not expired, dismissal of the purchaser's complaint constituted an abuse of discretion as a matter of law, since the defendants' mistake is neither ground for rescission of the contract nor for denial of specific performance, and, therefore, a judgment of specific performance is reinstated (CPLR 5501, subd [b]).

Counsel: *Thomas G. Sherwood* and *Vincent M. Albanese* for appellant. I. The court below erred in finding a "mutual" mistake of fact where defendants, in contracting to sell property to plaintiff subject to a second mortgage, ignored an unrecorded instrument signed by them and retained in their possession which accelerated the mortgage upon sale. *(Johns-Manville Corp. v Stone, 5 AD2d 110; Florence v Merchants Cent. Alarm Co., 51 NY2d 793; Pimpinello v Swift & Co., 253 NY 159; Hayward v Wemple, 152 App Div 195, 206 NY 692; 154 West 14th St. Co. v D. A. Schulte, Inc., 121 Misc 853, 210 App Div 851; Bailey Ford v Bailey*, 55 AD2d 729; *Matter of Town of Hempsted v Little, 22 NY2d 432; Scarnato v State of New York, 298 NY 376; 67 Wall St. Co. v Franklin Nat. Bank, 37 NY2d 245; Amend v Hurley, 293 NY 587; Matter of Eichner* [*Fox*], *73 AD2d 431; People v Gruttola, 43 NY2d 116.)* II. In any event, the court below erred in failing to award plaintiff a new trial on the issue of defendants' bad faith. *(Raphael v Booth Mem. Hosp., 67 AD2d 702; Precision Co. v Automotive Co., 324 U.S. 806; New York Football Giants v Los Angeles Chargers Football Club, 291 F2d 471; Kavanaugh v Kavanaugh Knitting Co., 226 NY 185; Rowe v Great Atlantic & Pacific Tea Co., 46 NY2d 62; Van Valkenburgh, Nooger & Neville v Hayden Pub. Co., 30 NY2d 34; Quigley v Capolongo, 53 AD2d 714, 43 NY2d 748; National Equip. Rental v J & I Carting, 73 AD2d 666.)*

Joseph A. Baum for respondents. I. Mutual mistake when clearly demonstrated permits rescission of a contract. *(McClure v Rignanese, 25 AD2d 565.)* II. Neither bad faith nor fraud by defendants have been pleaded or proven.

Judges: Meyer, J. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.

Opinion by: MEYER

Opinion

[*545] [383] OPINION OF THE COURT**

[***51] ***HN1*** Absent any evidence of hardship upon the seller of real estate resulting from his negligent mistake, or of knowledge or reason to know of the mistake on the part of the purchaser, it is an abuse of discretion as a matter of law to deny specific performance to the purchaser and dismiss the complaint. The order of the Appellate Division should, therefore, be reversed and the judgment of Special Term awarding plaintiff specific performance should be reinstated, with costs.

The action arises out of the execution on August 29, 1978 of a binder under which plaintiff agreed to purchase and defendants to sell an apartment building for $ 641,000. The binder provided that the purchaser was to take subject to a first mortgage of $ 335,000 bearing interest of 9 1/2%, [1] a second mortgage of $ 116,000 bearing interest of 8 1/2% per [*546] annum payable $ 17,448 annually, principal due 1988, [2] and by purchaser executing a purchase money third mortgage of $ 90,000 bearing interest of 8 1/2% per annum payable $ 13,390.56 annually, principal due 1985. The balance of $ 100,000 was to be paid in cash, $ 1,000 on signing the binder, $ 9,000 additional on signing the formal contract, and $ 90,000 at title closing.

No formal contract was ever signed because in preparing the contract the sellers' attorney brought to their attention the provision in an unrecorded agreement extending the second mortgage under which sale by the mortgagors of the premises within five years from July 15, 1976 accelerated the entire balance. The extension agreement had been signed July 26, 1976, two years and one month prior to the execution of the binder and the acceleration clause [***52] was added to the printed extension agreement as a typewritten provision which appeared on the signature page. There was testimony that the mortgagees agreed to waive the acceleration provision upon a principal payment of $ 22,000, of which the purchaser agreed to pay $ 10,000, but that defendants refused to pay any part of such sum. The contract closing therefore aborted [**384] and the present action for specific performance was begun by the purchaser, who filed a notice of pendency.

The sellers' answer set forth defenses of Statute of Frauds, mutual mistake and fraud. [3] The Trial Judge held that the binder contained all essential terms and, therefore, constituted a valid contract; that there was no fraud on the part of the purchaser; that defendants had failed to demonstrate mutual mistake, since the purchaser was not aware of [*547] the acceleration provision; and that, absent proof of fraud on the part of plaintiff, defendants' unilateral mistake of which the purchaser had no knowledge and which resulted from the negligence of defendants constituted an insufficient basis for rescission. He, therefore, awarded judgment of specific performance to plaintiff.

The Appellate Division agreed with the trial court's conclusion that the binder constituted a sufficient contract, but reversed, nevertheless, and dismissed the complaint because the "binder agreement was based on the mistaken belief by both sides that the $ 116,000 mortgage would remain in effect"; there was no fraudulent intent on the part of the sellers; and their forgetfulness did not call for the drastic remedy sought by plaintiff since rescission would place plaintiff in *status quo ante*.

The Trial Judge concluded that the mistake was "the result of the defendants' negligence", they having executed the extension agreement and it having been in their possession since July 26, 1976. The Appellate Division found that the mistake was "due to the unawareness or forgetfulness" of defendants. ***HN2*** The Appellate Division and the Trial Judge having disagreed in their findings of fact and in consequence on the appropriateness of granting the discretionary remedy of specific performance, our court has the power to review the facts and the exercise of discretion (CPLR 5501, subd [b]; *Matter of Ray A. M., 37 NY2d 619, 622)*. Furthermore, ***HN3*** the grant or denial of specific

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[1] The other terms of the first mortgage are irrelevant to decision of this case.

[2] The 1988 date is erroneous; the mortgage provided that any principal balance and interest remaining unpaid on April 1, 1986 would be due on that date. The discrepancy is irrelevant, however, in light of the conclusion concerning the acceleration provision reached in this opinion. A further reason for according it no significance is that mathematical calculation based upon the interest rate and annual payment provided for establishes that by April 1, 1986 the entire principal and interest will have been paid.

[3] A counterclaim based on plaintiff's filing of a notice of pendency was also alleged. The counterclaim was dismissed on plaintiff's motion for summary judgment and defendants' appeal from that order was dismissed (***70 AD2d 650***). The matter went to trial, therefore, only on the complaint and the defenses.

performance is a matter of sound judicial discretion, "not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity" *(Willard v Tayloe*, 8 Wall [75 U.S.] 557, 567; accord *Hammer v Michael, 243 NY 445, 449*; *Phalen v United States Trust Co., 186 NY 178, 182)*. Since this is not a situation in which "there are no 'as matter of law' requirements one way or the other" *(Vanderbilt v Vanderbilt, 1 NY2d 342, 353)*, ***HN4*** denial of specific performance would constitute an abuse of discretion as a matter of law if there is no evidence to sustain the conclusion that requiring it would be a "drastic" or harsh remedy *(Hammer v Michael, supra*; cf. *Patron v Patron, 40 NY2d 582*; **[*548]** see Siegel, New York Practice, § 529; Cohen and Karger, Powers of the New York Court of Appeals, §§ 157, 158). For the reasons hereafter stated we conclude that the weight of the evidence supports the findings of the Trial Judge and that there is no evidence to support the Appellate Division's conclusion that granting specific performance would be harsh. Moreover, though the rules of law governing mistake as related to specific performance differ from those governing rescission for mistake (see *Kleinberg v Ratett, 252 NY 236, 240)*, we conclude that on this record it was error for the Appellate Division to dismiss the complaint and thus, in effect, grant rescission.

[*53]** Specific performance may be denied for mistake even though the mistake is the defendant's own act or omission for which plaintiff is not in the least responsible *(Kleinberg v Ratett, supra; Gordon v Mazur, 284 App Div 289*, affd *308 NY 861*; *Covart v Johnston, 61 Hun 622* [opn at 15 NYS **[**385]** 785], affd *137 NY 560*; *Bowman v McClenahan, 19 Misc 438*, affd without reaching issue *20 App Div 346*; see *Willard v Tayloe*, 8 Wall [75 U.S.] 557, *supra*; Pomeroy, Specific Performance of Contracts [3d ed], § 245, p 592). However, when the mistake is the result of defendant's own carelessness, not contributed to by conduct of the plaintiff, specific performance will be denied only in a case "of considerable hardship, or * * * when plaintiff must himself have been aware of the mistake" (Pomeroy, *op. cit.*, at p 595; see, also, 11 Williston, Contracts [3d ed], § 1427, p 858; Patterson, Equitable Relief for Unilateral Mistake, 28 Col L Rev 859, 899-900). Thus, in *Kleinberg*, a purchaser of real estate who was unaware of the presence of an underground stream was held not entitled to rescind the contract, there having been no fraud or deceit on the seller's part, but the seller's counterclaim for specific performance was denied because the seller was aware of the stream and "great hardship will result if the contract be specifically enforced" (*252 NY, at p 240*). Similarly, specific performance was denied, because of the hardship that would result, in *Bowman*, against a purchaser who bought for immediate use without knowledge that the sale was subject to an unexpired lease and in *Covart* because of the difference in value between **[*549]** what the contract wording included and what the seller believed was included. Nor is the dictum in *McClure v Rignanese* (25 AD2d 565), [4] upon which defendants so heavily rely, to the contrary, for the difference in interest rate payable on the mortgage the plaintiff purchaser in that case would have assumed would have materially and adversely affected the economic consequences of the transaction for the defendant sellers.

The record in this case contains no evidence from which it could be concluded that defendants would suffer hardship or adverse economic consequences from enforcement of the binder. To the contrary, defendants' willingness to accept a purchase money third mortgage at 8 1/2% establishes that 8 1/2% is a fair return for the somewhat more secure second mortgage. Requiring defendants specifically to perform would, unless the second mortgagee waived the acceleration provision, require defendants to pay the mortgagees but would not terminate plaintiff's obligation to take subject either to the existing second mortgage after assignment to defendants or to a new second mortgage of the same terms. That defendants would have to raise the cash to pay the present holders of the second mortgage is not per se such a hardship as to mandate denial of specific performance (see *Turner v Washington Realty Co., 128 SC 271, 277)*. Defendants would still receive for their apartment house the exact consideration for which they bargained and would be compensated for having to finance the additional $ 116,000 they would be required to advance at the same 8 1/2% interest rate they had acknowledged, by agreeing to accept a third mortgage bearing the same rate, to be a fair return on their money (see *Schmaltz v Weed, 57 App Div 245, 251)*. It is, of course, conceivable that defendants' financial position might so far affect the interest rate on, or maturity date of, funds they had to borrow to satisfy the holders of the existing $ 116,000

[4] The holding of the case was that the binder contained only a provision that made the sale contingent upon the buyer's ability to assume the misdescribed mortgage, not a promise by defendant to convey subject to that mortgage.

second mortgage as to make it a hardship for them to accept from plaintiff a second mortgage with the interest rate or maturity date of that mortgage. There **[*550]** is, however, nothing in the record to suggest **[***54]** that this is the case. [5] Conceivably also a rising market may have increased the value of the property, but "subsequent fluctuations in the value of property * * * are not allowed to prevent * * * specific enforcement" **[**386]** (*Willard v Tayloe, 8 Wall, at p 571, supra*; see 11 Williston, Contracts [3d ed], § 1425, p 833). There is, therefore, no evidence that hardship would be visited upon the defendants by requiring them to complete the sale on the terms contracted for.

The Trial Judge found that the extension agreement in which the acceleration clause appeared was unrecorded and that "plaintiff had no way of uncovering" defendants' mistake, the agreement having been in defendants' possession from the date of its execution, and the Appellate Division made no contrary finding. There being no other evidence of hardship and an affirmative finding that plaintiff neither knew nor had reason to know of defendants' mistake, the grant or denial of specific performance turns, under the rules stated above, on whether the mistake resulted from negligence on defendants' part as the Trial Judge found or on unawareness or forgetfulness as the Appellate Division found.

Our review of the record leads us to conclude that the weight of the evidence is with the Trial Judge's finding. Both partners, Partridge and Musso, signed the binder and both signed the extension agreement. A period slightly in excess of two years elapsed between the signing of the two documents. Furthermore, the acceleration clause appears on the same page as and within two inches of the signature lines and is the last typewritten clause on the page. ***HN5*** Under long accepted principles one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents (*Florence v Merchants Cent. Alarm Co., 51 NY2d 793, 795; Pimpinello v Swift & Co., 253 NY 159; Johns-Manville Sales Corp. v Stone, 5 AD2d 110, 114*; see *Hayward v Wemple, 152 App Div 195*, affd *206 NY 692*). Thus, both defendants are chargeable with knowledge of the existence of the acceleration clause. Moreover, **[*551]** the agreement being in their possession, they had the means of ascertaining the true facts. Yet only one of the partners, Partridge, testified and his only testimony on the question was that he first discovered the acceleration clause when it was brought to his attention by his attorney at the aborted contract closing. *Grymes v Sanders (93 U.S. 55, 61)* teaches that ***HN6*** "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible." On the record before us we conclude that defendants were legally, if not factually, aware of the existence of the clause and that their mistake resulted from their negligence in failing to take the means readily accessible of checking the second mortgage documents (cf. *Libby, McNeill & Libby v Bush Term. Bldg. Co., 121 Misc 228*, mod *208 App Div 713*; *Turner v Washington Realty Co., 128 SC 271, 276, supra; Bibber v Carville, 101 Me 59*). [6]

It was error also to dismiss the complaint and thus, in effect, by foreclosing plaintiff's recovery of damages (demanded as an alternative remedy in the complaint), to grant defendants rescission. Defendants' answer contained no counterclaim for rescission nor was it amended by any motion before or during trial. More importantly, however, the evidence presented did not authorize rescission.

[*55]** The Trial Judge found that the "mistake was, if anything, unilateral"; the Appellate Division characterized it as a "mistaken belief by both sides." The confusion resulting from the unilateral/mutual dichotomy has been the subject of much comment (*Ricketts v Pennsylvania R. R. Co., 153 F2d 757, 760* [Frank, J., concurring]; Newman, Relief for Mistake in Contracting, 54 Cornell L Rev 232; Rabin, A Proposed Black-Letter Rule Concerning **[**387]** Mistaken Assumptions in Bargain Transactions, 45 Tex L Rev 1273; Patterson, Equitable Relief for Unilateral Mistake, 28 Col L Rev 859, 899-900; Restatement, Contracts 2d [Tent Draft No. 10], p 7 [Reporter's Note]), and it can be argued that the distinction should be abandoned (compare Restatement, **[*552]** Contracts 2d [Tent Draft No. 10], § 294, with § 295). But ***HN7*** whether the mistake be of one or both parties, the law is that

[5] Indeed, the contrary is suggested by plaintiff's testimony, concurred in by defendants, that the second mortgagees were prepared to waive the acceleration provision upon reduction of the mortgage by $ 22,000.

[6] To be distinguished is the situation in *JNA Realty Corp. v Cross Bay Chelsea* (42 NY2d 392), in which we held that equity would not permit a landlord to forfeit a long term lease in which the tenant had made substantial investment, because of the forgetfulness of the tenant in exercising an option to renew.

rescission is proper only when "the mistake is so material that we can see it goes to the foundation of the agreement" (*Belknap v Sealey, 14 NY 143, 155*; accord *Dambmann v Schulting, 75 NY 55, 64*; *Restatement, Contracts, § 502*; Restatement, Contracts 2d [Tent Draft No. 10], §§ 294, 295). Comment *a* to section 294 of the Restatement, 2d, makes clear that: "Relief is only appropriate in exceptional situations, where a mistake of both parties upsets the very basis for the contract in such a way as to have a material effect on the agreed exchange of performances," and Comment *b* to section 295 notes that the same requirements apply when a party seeks to avoid a contract "for a mistake that he alone made". But, as already discussed above, defendants' mistake had no effect upon the agreed exchange of performance, for defendants will receive neither more nor less than that for which they bargained with plaintiff. An additional reason for denial of rescission is our conclusion, noted above, that defendants were negligent in failing to check the extension agreement, negligence being a bar to rescission (*Bailey Ford v Bailey, 55 AD2d 729*; see *Kleinberg v Ratett, 252 NY 236, supra*; cf. *Bowman v McClenahan, 19 Misc 438, 439*, affd without reaching issue *20 App Div 346, supra*; Restatement, Contracts 2d [Tent Draft No. 10], § 299, and Comment *b*; 11 Williston, *op. cit.*, § 1596).

There being neither ground for denial of specific performance nor for rescission, the order of the Appellate Division should be reversed, with costs, and the judgment of specific performance should be reinstated. [7]

Order reversed, with costs, and the judgment of Supreme Court, Queens County, reinstated.

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[7] Ironically, the acceleration clause having expired by its own terms on July 15, 1981, plaintiff will take under the judgment subject to the existing second mortgage with appropriate adjustment at the closing for interest and principal paid by defendants on that mortgage while this matter was proceeding through the courts.

New York
Official Reports

230 A.D.2d 465, 660 N.Y.S.2d 115

Edward Weissman, Appellant,

v.

Bondy & Schloss et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
60245
June 24, 1997

CITE TITLE AS: Weissman
v Bondy & Schloss

SUMMARY

Appeal from an order of the Supreme Court (Alice Schlesinger, J.), entered April 8, 1996 in New York County, which, *inter alia,* denied plaintiff's motion to compel defendants to perform obligations required by a stipulation of settlement between the parties and granted defendants' cross motion for, *inter alia,* an order amending and reforming the stipulation.

HEADNOTES

Contracts
Rescission
Mutual Mistake--Unjust Enrichment

(1) The IAS Court erred in vacating a stipulation settling all of the parties' claims and counterclaims involving the disbursement of funds from decedent's estate and the real estate holding companies formerly owned by decedent on the ground of mutual mistake concerning the capital gains tax on certain unimproved property that would become due and owing upon the transfer of the property to plaintiff, since the "mistake" as to the applicable tax law was not mutual. Rather, defendants unilaterally misunderstood or failed to consider the tax implications of the mechanism agreed upon for the transfer of the property to plaintiff. The rule that a corporation must recognize taxable gain when it distributes appreciated property to a shareholder in exchange for its own stock, as occurred here (Internal Revenue Code [26 USC] § 311 [b] [1]), could have been discovered upon diligent research by the defendants. Moreover, plaintiff maintained throughout that he was not responsible for the capital gains tax upon the transfer of the property to him. In addition, equitable principles do not warrant rescission of the stipulation of settlement because of defendants' unilateral "mistake". The parties were acting in an adversarial relationship when the stipulation was entered, settling a legal dispute where both sides were represented by counsel and both were aware that there were tax consequences in their actions. Plaintiff gave up his entire beneficial interest in an estate with a gross value in excess of $3 million and remained liable for 10% of the estate tax. In return, plaintiff received property worth approximately $446,000 or 13% of the value of all the property owned by the estate. Under these circumstances, there was no unjust enrichment of the plaintiff at the expense of the defendants that should be remedied by equity. Accordingly, plaintiff's motion for an order compelling defendants to perform pursuant to the stipulation should be granted.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Contracts, §§ 213, 215, 218, 219, 569.

26 USCS § 311 (b) (1). ***466**

NY Jur 2d, Contracts, §§ 124-127, 129, 512, 514, 540.

ANNOTATION REFERENCES

See ALR Index under Cancellation or Rescission; Contracts; Mutual Mistake; Unjust Enrichment.

APPEARANCES OF COUNSEL

Michele Kahn of counsel *(Joel S. Sankel* on the brief; *Sankel, Skurman & McCartin, L. L. P.,* attorneys), for appellant.
Jamie M. Brickell of counsel *(James S. O'Brien, Jr.,* on the brief; *Pryor, Cashman, Sherman &Flynn,* attorneys), for respondents.

OPINION OF THE COURT

Nardelli, J.

Plaintiff is the son of decedent Jacob Weissman and defendants Josephine Hall and Sonia Weissman are, respectively, his sister and mother. These family members are the sole officers, directors and shareholders of the three defendant corporations, real estate holding companies formerly owned by the decedent. In addition, plaintiff,

defendant Hall and their mother are the sole executors and beneficiaries of the estate of Jacob Weissman, which owns 60% of the shares of the corporations and a substantial amount of improved and unimproved land in Woodstock, New York. The parties had disputes over the disbursement of funds from the estate and the corporations and the plaintiff in a petition seeking dissolution of the three corporations alleged conversion and waste of assets by the other family members. After a fact-finding hearing before a Referee, the parties resolved the disputes in a stipulation that settled all of the parties' claims and counterclaims. This stipulation was "so ordered" by the court on June 29, 1995. Plaintiff resigned as officer and director of the three corporations and assigned all his shares to the individual defendants. He also resigned as trustee and assigned his beneficial interest in any trusts created pursuant to the will of his father Jacob Weissman. Plaintiff waived his rights as a beneficiary of the estate except as provided in the stipulation, and withdrew his objections to the accountings of the individual defendants in Surrogate's Court. In return, defendants Hall and Weissman agreed to pay plaintiff $50,000 and convey some improved property and unimproved property in Woodstock to plaintiff as the balance of his share of the estate. The improved property, ***467** valued for estate tax purposes at $200,000, was conveyed to the plaintiff directly by the estate, which was its owner. The unimproved property, whose stated value for estate tax purposes was $240,000, was owned by Vane Realty Corp. It was to be conveyed by means of a transaction in which plaintiff would receive shares in Vane Realty believed to be equal in value to the unimproved property. Plaintiff would then transfer and assign these shares to Vane in return for a conveyance of the property to him. The defendants would retain control of the various corporations and remaining parcels of realty owned by the estate. The estate tax liability was split between the parties with defendants liable for 90% and plaintiff for 10% thereof. To ensure payment of the taxes as agreed, defendants were required to execute a confession of judgment in the amount of $2,250,000 in favor of plaintiff and plaintiff was required to place in escrow up to 50% of the net proceeds realized upon his resale of the Woodstock property.

Thereafter, there were disputes with regard to implementation of the stipulation, and plaintiff sought to compel his mother and sister to comply with the cash payment and the transfer of the Woodstock property. In opposition, defendant Hall stated that she had been advised that the capital gains tax on the Woodstock property would become due and owing upon the transfer of the property to the plaintiff by Vane Realty Corp., prior to any sale by the plaintiff, and that this was not the intent of the agreement when it was executed. Defendants, therefore, sought reformation of the agreement. The court, as noted, vacated the stipulation, finding that a material aspect of the agreement was not understood and considered by the parties.

Initially, defendants-respondents, contrary to the finding by the IAS Court, ratified the agreement by taking certain actions only allowed if the agreement were in full force. Thus, defendants sold a parcel of property in Manorville, New York, negotiated tax liens with the Internal Revenue Service and paid counsel fees of $225,000 to defendant Bondy & Schloss, after entering the agreement.

In any event, the agreement was improperly vacated by the IAS Court. "Stipulations of settlement are favored by the courts and not lightly cast aside (see *Matter of Galasso,* 35 NY2d 319, 321). This is all the more so in the case of 'open court' stipulations (*Matter of Dolgin Eldert Corp.,* 31 NY2d 1, 10) within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential ***468** to the management of court calendars and integrity of the litigation process. 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 (*Matter of Frutiger,* 29 NY2d 143,149-150)." (*Hallock v State of New York,* 64 NY2d 224, 230.)

Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission (*Matter of Gould v Board of Educ.,* 81 NY2d 446, 453). The mutual mistake must exist at the time the contract is entered into and must be substantial. "The idea is that the agreement as expressed, in some material respect, does not represent the 'meeting of the minds' of the parties" (*supra,* at 453). However, in this case, defendants seek rescission of the stipulation based upon a unilateral mistake as to the applicable tax law. Thus, they unilaterally misunderstood or failed to consider the tax implications of the mechanism agreed upon for the transfer of the Woodstock property from the Vane corporation to plaintiff. As noted by the IAS Court, there were "intense negotiations between the parties," who were represented by counsel at all times, with respect to the terms of the stipulation. The agreement itself, as noted above, contains various provisions specifically detailing the apportionment of estate tax liability and specifically requiring that "50% of the net proceeds (up to 10% of the outstanding estate tax liability, but not to exceed a total amount of $250,000) from

any Edward [plaintiff] re-sale [of the Woodstock property] shall be deposited in an interest bearing account with his attorneys ... in escrow to ensure payment of his share of estate taxes". The term "net proceeds" refers to the proceeds realized by plaintiff on his *re-sale* of the property and is defined in paragraph 24 as the gross sales price less, *inter alia,* broker's commissions, transfer taxes and *capital gains taxes.* Given the context, the capital gains taxes referred to could only be the taxes on the capital gains realized *by plaintiff* upon his resale of the property. Since both parties consulted with counsel and tax experts when negotiating the stipulation, the silence of the agreement with respect to the payment of capital gains taxes concededly due upon the transfer of the property from Vane Realty to plaintiff does not support the IAS Court's conclusion that neither party considered the matter, upon which the court based its finding of mutual mistake. The rule that a corporation must recognize taxable gain when it distributes appreciated property to a ***469** shareholder in exchange for its own stock is set forth in Internal Revenue Code (26 USC) § 311 (b) (1), and since this was the exact manner in which the Woodstock property was to be transferred to the plaintiff pursuant to the stipulation, it could have been discovered upon diligent research by the defendants. "Here, the parties' mistake amounts to nothing more than a misunderstanding as to the applicable law, and CPLR 3005 does not direct undoing of the transaction (*cf., Gimbel Bros. v Brook Shopping Ctrs.,* 118 AD2d 532 [lack of diligence in determining legal obligations under contract did not entitle party to restitution on the ground that it acted under a mistake of law])." (*Symphony Space v Pergola Props.,* 88 NY2d 466, 485).

Therefore, the "mistake" as to the applicable law cannot be described as mutual. Moreover, plaintiff maintained throughout that he was not responsible for the capital gains tax upon the transfer of the property to him.

Even where a mistake is unilateral, as herein, not mutual, a court acting in equity may rescind the contract if failing to do so would result in unjust enrichment of the plaintiff (*Matter of Gould v Board of Educ., supra,* at 453). Plaintiff would not, however, be unjustly enriched by enforcement of the stipulation as executed after arm's length negotiation. "A person may be deemed to be unjustly enriched if he (or she) has received a benefit, the retention of which would be unjust (Restatement, Restitution, § 1, Comment *a*). A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties. It is a conclusion reached through the application of principles of equity." (*Sharp v Kosmalski,* 40 NY2d 119, 123.)

Applying equitable principles herein, it can readily be seen that the parties were acting in an adversarial relationship when the stipulation was entered, settling a legal dispute where both sides were represented by counsel and both were aware that there were tax consequences in their actions. Plaintiff gave up his entire beneficial interest in an estate with a gross value of $3,378,250 (as reported in the estate tax return), and remained liable for 10% of the estate tax. In return, plaintiff received property worth approximately $446,000 or 13% of the value of all the property owned by the estate. Under these circumstances, there was no unjust enrichment of the plaintiff at the expense of the defendants-respondents that should be remedied by equity. ***470**

Accordingly, the order of the Supreme Court, New York County (Alice Schlesinger, J.), entered April 8, 1996, which, *inter alia,* denied plaintiff-appellant's motion for an order compelling defendants-respondents to perform obligations required by a stipulation of settlement between the parties, so ordered on June 29, 1995 (same court and Justice), and granted defendants-respondents' cross motion for, *inter alia,* an order amending and reforming the stipulation, by rescinding and setting aside the agreement and directing that a hearing be held, should be reversed, on the law and facts, with costs and disbursements payable to plaintiff-appellant, and defendants-respondents' cross motion to reform or amend the agreement denied and plaintiff-appellant's motion for an order compelling defendants-respondents to perform pursuant to the stipulation granted.

Milonas, J. P., Ellerin and Wallach, JJ., concur.
Order, Supreme Court, New York County, entered April 8, 1996, reversed, on the law and facts, with costs and disbursements payable to plaintiff-appellant, motion by plaintiff-appellant for an order compelling defendants-respondents to perform pursuant to the stipulation of settlement granted and cross motion by defendants-respondents to reform or amend said stipulation denied. ***471**

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Implied Overruling Recognized by Edge Group WAICCS LLC v. Sapir Group LLC, S.D.N.Y., April 7, 2010

23 N.Y.2d 293
Court of Appeals of New York.

Henry RUBINSTEIN, Appellant,
v.
Leo RUBINSTEIN, Respondent.

Nov. 27, 1968.

Action brought by one cousin against another for specific performance of agreement whereby parties were to sever their business relations. The Supreme Court at Special Term, New York County, George Postel, J., denied dismissal motion of defendant, denied cross motion of plaintiff for summary judgment for specific performance, and granted plaintiff's cross motion for summary judgment to extent of awarding damages of $5,000 to plaintiff. On appeal, the Supreme Court, Appellate Division, 28 A.D.2d 1121, 285 N.Y.S.2d 125, affirmed, and further appeal was taken. The Court of Appeals, Keating, J., held that plaintiff was entitled to specific performance of the agreement which contained a clause providing for the forfeiture of a $5,000 deposit as liquidated damages if either party refused to consummate the transaction, since the aforementioned clause did not expressly preclude relief of specific performance, since plaintiff had no adequate remedy at law, and since the agreement was enforceable by a court of equity.

Order of Appellate Division reversed and plaintiff's motion for summary judgment for specific performance granted.

Fuld, C.J., and Bergan, J., dissented.

West Headnotes (7)

[1] **Specific Performance**
Effect of Stipulations for Liquidated Damages or Penalty

Plaintiff, who brought suit against his cousin for specific performance of agreement whereby parties were to sever their business relations, was entitled to specific performance of the agreement which contained a clause providing for the forfeiture of $5,000 deposit as liquidated damages if either party refused to consummate the transaction, since the aforementioned clause did not expressly preclude relief of specific performance, since plaintiff had no adequate remedy at law, and since the agreement was enforceable by a court of equity.

4 Cases that cite this headnote

[2] **Specific Performance**
Subject-Matter of Contracts in General

As principal aim of agreement was to sever cousins' business relationship and enable each cousin to own completely, separately and without interference one-half of the joint business, it was evident that desired result could not be achieved by a damages award, and that plaintiff-cousin, who brought suit for specific performance of the agreement, had no adequate remedy at law.

Cases that cite this headnote

[3] **Specific Performance**
Effect of Stipulations for Liquidated Damages or Penalty

A liquidated damages provision will not in and of itself be construed as barring the remedy of specific performance; for there to be a complete bar to equitable relief, there must be something more, such as explicit language in the contract that the liquidated damages provision is to be sole remedy.

18 Cases that cite this headnote

[4] **Specific Performance**
Effect of Stipulations for Liquidated Damages or Penalty

Specific performance of agreement whereby cousins were to sever their business relations was not precluded by clause providing for forfeiture of deposit of $5,000 as liquidated damages if either party refused

to consummate subject transaction, since a liquidated damages provision, to be a complete bar to equitable relief, must normally contain unambiguous language to the effect that such provision is to be sole remedy, and since clause in question contained no unambiguous language to such effect.

17 Cases that cite this headnote

[5] **Damages**
Nature as Compensation for Actual Damage

Law generally presumes that primary purpose of a contract, not expressly stated to be an option, is performance of act promised and not nonperformance, and penalty clauses, even liquidated damages clauses, are generally inserted to help secure performance and to avoid litigation as to quantum of damages.

3 Cases that cite this headnote

[5] **Damages**
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Law generally presumes that primary purpose of a contract, not expressly stated to be an option, is performance of act promised and not nonperformance, and penalty clauses, even liquidated damages clauses, are generally inserted to help secure performance and to avoid litigation as to quantum of damages.

2 Cases that cite this headnote

[6] **Specific Performance**
Subject-Matter of Contracts in General

Provisions of contract, whereby cousins were to sever their business relations, were fully capable of being carried out, performance entailing almost no difficulty; and accordingly, said contract was enforceable by a court of equity.

Cases that cite this headnote

Attorneys and Law Firms

***356 **50 *294** Robert Markewich and Irving F. Cohen, New York City, for appellant.

David Bergner, New York City, for respondent.

Opinion

***295** KEATING, Judge.

Henry and Leo Rubinstein are distant relatives. For some years they had successfully operated a number of joint enterprises. In July, 1965 they owned an equal number of shares in two corporations, one of which operated a grocery business on Third Avenue in New York City ('Premium') and the other a delicatessen business on First Avenue ('Kips Bay'). In addition, the cousins had equal interests in two other corporations. One held title to real property on which the Kips Bay delicatessen was conducted and the other to the adjoining parcel.

Prior to July, 1965 differences arose. The cousins decided on a parting of the ways. On July 20, 1965, with each party represented by his own counsel, an agreement was signed. Its basic outline was this. Each business was valued at $70,000. Henry was to choose immediately between the two businesses. Leo would get the other. The agreement also provided that whoever took the Kips Bay delicatessen would also take the realty located there. Although the agreement established a procedure by which the realty was to be valued, it appears that the realty played an insignificant part in the negotiations.

At the time the agreement was executed, Henry and Leo deposited $5,000 with their respective lawyers. The agreement stated this sum would 'be held in escrow by each respective attorney, to be applied towards the payment that each of the parties may have to make to the other party upon the closing of the above transaction.' Any surplus, after the necessary adjustments, was to be returned to Henry and Leo at the time ***296** of the closing. These two provisions, which appear in paragraph numbered '8', are then followed by this clause: 'In the event ***357** that either of the parties hereto shall default or refuse to consummate this transaction, then the aforesaid $5,000.00 deposited by such defaulting party shall be forfeited as liquidated damages and such sum shall be paid by the escrowee thereof to the other party.'

The day after the execution of the agreement Henry sent a letter to Leo's lawyer in which he elected to take the Kips Bay property. The agreement provided that the closing would take place within one week. Apparently, disputes arose as to how various details of the transaction should be worked out, and in October of 1965 the deal still had not been consummated. At this point, Henry instituted this suit in Supreme Court, New York County, for specific performance. An answer was interposed by the defendant in which he counterclaimed for specific performance, also alleging the lack of an adequate remedy at law.

Leo thereafter had a complete change of mind. He changed lawyers and in September, 1966 moved to strike the complaint from the equity calendar on the ground that the quoted provision of the agreement relegated Henry to an action at law for $5,000. Henry cross-moved for summary **51 judgment for specific performance. Leo then moved for leave to serve a proposed amended answer to remove the counterclaim for equitable relief.

Special Term found that it 'is clear that the defendant does not desire to go through with the contract', and ruled that plaintiff was entitled to summary judgment, but held that the clause quoted above constituted not only a liquidated damages provision but, as a matter of law, it constituted the sole relief to which plaintiff was entitled. The correctness of this holding is the principal legal issue presented by this appeal.

On appeal to the Appellate Division by the plaintiff, the order entered upon Special Term's decision was affirmed by a closely divided court. Two members of the majority agreed with Special Term's reasoning, but also were of the opinion that, as a matter of law, the agreement was incapable of being enforced by a decree in equity. In their view, there were too many 'open ends to the contract' and the agreement appeared to be 'preliminary in nature'. The dissenters rejected both propositions, holding that the provision for monetary damages in the sum of *297 $5,000 was not intended to be an alternative to specific performance and that plaintiff did not have an adequate remedy at law. Moreover, '(S)pecific performance would not here be 'inconsistent with the express terms of the contract' (see, 55 N.Y.Jur., Specific Performance, s 11)'.

The Justice who cast the deciding vote was of the opinion that the provision in the contract was intended to cover all damages which might be sustained upon a failure or refusal to perform and it precluded the granting of specific performance by providing for a forfeiture of $5,000. ***358 Otherwise, on the question as to the appropriateness of equitable relief, he would have remanded for a trial to determine whether, under all the circumstances, the grant of the remedy of specific performance should be granted.

[1] We conclude that the pertinent clause does not preclude the relief of specific performance, that plaintiff does not have an adequate remedy at law and that the agreement is enforcible by a court of equity. Therefore, plaintiff's motion for summary judgment for specific performance should have been granted.

[2] We may immediately dispose of a preliminary argument, namely, that plaintiff has an adequate remedy at law. On its face the principal aim of this agreement was to sever the parties' relationship and to enable each party to own completely, separately and without interference by the other one half the joint business. It is evident that this result cannot be achieved by a damage award, and respondent does not seriously argue that plaintiff has an adequate remedy at law.

We turn then to the main question presented by this appeal, whether the agreement by its terms or in light of surrounding circumstances precludes specific performance. Nothing in the language of the contract explicitly states that the liquidated damages provision was to be plaintiff's sole and exclusive remedy, but both Special Term and the Appellate Division majority found the liquidated damages provision itself precluded specific performance. This is made clear by the following language in the prevailing opinion: 'Properly considered, clause Eight in the contract relating to the $5,000 was nothing more than an option, affording the plaintiff a choice not to go forward, if he was willing to forfeit $5,000.'

[3] In relying on the liquidated damages clause alone the majority was clearly in error. The law is now well settled that a liquidated *298 damages provision will not in and of itself be construed as barring the remedy of specific performance (Phoenix Ins. Co. v. Continental Ins. Co., 87 N.Y. 400; Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419; see, also, **52 Wirth & Hamid Fair Booking v. Wirth, 265 N.Y. 214, 192 N.E. 297; Restatement, Contracts, s 378). For there to be a complete bar to equitable relief there must be something more, such as explicit language in the contract that the liquidated damages provision was to be the sole remedy.

Such was the case in Artstrong Homes v. Vasa (23 Misc.2d 608, 201 N.Y.S.2d 138) cited by the majority below.

In Wirth & Hamid Fair Booking v. Wirth (supra), Judge LEHMAN, writing for the court, pointed out that this rule was not always clear. He wrote (265 N.Y., supra, p. 224, 192 N.E. p. 301): 'Indeed there was, at one time, doubt whether a party might invoke the equitable remedy ***359 of injunction against a breach of a contract where the parties had stipulated the amount of damages which should be paid upon such breach. Argument was made that a provision for liquidated damages must be construed as providing the alternative rights in the promisor to perform his promise or pay the liquidated damages as the price of non-performance. performance. In Diamond Match Co. v. Roeber, 106 N.Y. 473, 486, 13 N.E. 419, 424, this court has settled the rule in this state, saying: 'It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in Long v. Bowring, 33 Beav. 585, which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, 'all that is settled by this clause is that if they bring an action for damages the amount to be recovered is 1,000, neither more nor less.'"

In Phoenix Ins. Co. v. Continental Ins. Co. (supra), cited by the court in Diamond, the issue was presented whether a covenant by a grantee of realty not to erect any building on a portion of the property sold was enforcible where the deed provided that 'for a violation of the covenant' the grantee agreed to pay $1,500 as 'liquidated damages'. In holding for the plaintiff the court stated: 'In determining whether, by the true construction of a covenant, the penalty is the price of the privilege of non-performance, the fact that the contract liquidates the *299 damages for a breach may be considered, but it is not a decisive, nor do we regard it as a very material circumstance.' (87 N.Y., supra, p. 406.)

Professor Corbin writes: 'The question whether a particular contract it truly an alternative contract is one of interpretation. The forms of words used may be decisive; but there are no particular words that are in themselves conclusive. It may be said, however, that, if there is a promise to render one particular performance, with a provision for payment of a sum of money as a penalty or as liquidated damages for breach, without anything more, the contract is not an alternative contract.' (Emphasis supplied; 5A Corbin, Contracts, s 1213, pp. 435—436.)*

[4] **[5]** It is interesting to note that nowhere in this contract can be found the word 'option' although this is the term used by the Appellate Division majority to describe the instant contract. Absent, therefore, ***360 an unambiguous provision, the majority below was in error in finding that the language itself precluded specific performance and for a very sound reason. Generally, the law presumes that the primary purpose of a contract, not expressly stated to be an option, is performance of the act promised and not nonperformance (see Phoenix Ins. Co. v. Continental Ins. **53 Co., supra, p. 405, 13 N.E. 419). Penalty clauses and even liquidated damages clauses are generally inserted to help secure performance and to avoid litigation as to quantum of damages. In this way, it is hoped to induce performance by making delay or breaches unprofitable.

Moreover, the first reference to the $5,000 is that it was to be used in connection with the 'closing'. This clause signifies that the escrow deposit was not even intended to assure performance, which was presumed, but it was contemplated that it would be used in connection with the performance of the contract in question. Also to be considered is the fact that the closing—originally scheduled to take place within 48 hours— *300 was set for a week later. This surely evinces an intent that the contract be specifically performed.

The agreement grew out of a deterioration in the personal relations of the two cousins. Its first goal was the severance of their partnership. Defendant's interpretation would only provide Henry with the 'right' to continue as Leo's partner if Leo did not like the division. It would be preposterous for the parties to enter into an agreement providing that, at the risk of $5,000, the parties shall see if they can agree to a division. We may not presume persons act so irrationally. If the defendant desired the Kips Bay property as well as a severance, he could have demanded the right of first choice. Or some alternative method for dividing the business would have been devised. The fact that defendant was willing to give plaintiff the right to select the property indicates that his major desire was to terminate a relationship, which was no longer bearable, rather than to obtain a right to pay $5,000 for the privilege of being restored to the Status quo ante.

Nor is there anything in the surrounding circumstances which discloses a design that the liquidated damages clause is intended to bar specific performance. On this point, it is of significance that the same lawyer who represented the defendant at the time the agreement was made counterclaimed for specific performance. Defendant thus indicated that it was his understanding that the agreement could be specifically enforced.

The conclusion is clear. The agreement here does not bar plaintiff from seeking the remedy of specific performance. There being no question that defendant defaulted, plaintiff had his choice of remedies and he has elected specific performance.

***361 [6] A final point raised by the respondent is that equitable relief should not be granted since the agreement is allegedly ambiguous, vague, preliminary in nature and incomplete. This contention is distinctly without merit.

The provisions of this contract are fully capable of being carried out and performance would entail almost no difficulty. The shares of stock in the respective corporations could be transferred. This transfer of ownership is implicit in the phrase 'shall take' in the third paragraph of the agreement. The promise to hold harmless the non-electing party and his wife from liability on the mortgage on the Kips Bay realty does not *301 require the execution of a further agreement to be valid. If this agreement would not reasonably supply sufficient protection to the defendant, a court of equity has the power, in fashioning its decree, to demand that the party seeking equitable relief must do equity. This same principle can be applied to the other alleged ambiguities and difficulties. Thus, defendant would be required to assist plaintiff in obtaining approval for transfer of the liquor license. We need not speculate on the effect of the failure of the Liquor Authority to approve the transfer where there is no indication of any attempt by the defendant to carry out the terms of the agreement.

If any serious difficulties as to the meaning of various terms of the agreement do ultimately arise, and at present defendant **54 has shown none, oral testimony as to the meaning of the term in the agreement would appear proper. In any event, the propriety of equitable relief is one which should be resolved by the trial court since it is clear that the agreement does not, as a matter of law, bar equitable relief.

Accordingly, the order of the Appellate Division should be reversed and plaintiff's motion for summary judgment for specific performance should be granted, with costs in all courts.

BURKE, SCILEPPI, BREITEL and JASEN, JJ., concur with KEATING, J.

FULD, C.J., and BERGAN, J., dissent and vote to affirm for the reasons stated in the concurring memorandum of EAGER, J., at the Appellate Division.

Order reversed, with costs in all courts, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

All Citations

23 N.Y.2d 293, 244 N.E.2d 49, 296 N.Y.S.2d 354

Footnotes

* The other two cases cited by the majority below, Hasbrouck v. Van Winkle (261 App.Div. 679, 682, 27 N.Y.S.2d 72, 76, affd. 289 N.Y. 595, 43 N.E.2d 723) and City of New York v. Seely-Taylor Co. (149 App.Div. 98, 133 N.Y.S. 808, affd. 208 N.Y. 548, 101 N.E. 1098) are inapposite, since former involved in essence a suit to recover the agreed price for the sale of land and the latter was an action for damages.

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New York Official Reports

195 A.D.3d 728, 145 N.Y.S.3d 397
(Mem), 2021 N.Y. Slip Op. 03594

**1 In the Matter of Varone Irrevocable Trust. Michele Meyers, Appellant; Richard B. Varone, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
1612/16, 2018-00756
June 9, 2021

CITE TITLE AS: Matter of Varone Irrevocable Trust

HEADNOTE

Stipulations
Stipulation of Settlement
Enforcement—Clear and Unambiguous Provision That Trustee of Irrevocable Trust Would Transfer His Interest as Remainderman to Certain Real Property to Trust by Quit Claim Deed

Law Offices of Joanne Fanizza, P.A., Bay Shore, NY, for appellant.
Mark H. Weiss, P.C., Commack, NY (Michele Morley of counsel), for respondent.

In a proceeding pursuant to SCPA 2205 to compel a trust accounting, in which Richard B. Varone petitioned to judicially settle a trust account, Michele Myers appeals from an order of the Surrogate's Court, Suffolk County (John M. Czygier, Jr., S.), dated November 3, 2017. The order, insofar as appealed from, denied the motion of Anthony Varone and Michele Myers to enforce a stipulation of settlement dated December 8, 2016, and to remove Richard B. Varone as trustee of the trust, and, in effect, granted that branch of the cross motion of Richard B. Varone which was to rescind the stipulation of settlement.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof, in effect, granting that branch of the cross motion of Richard B. Varone which was to rescind the stipulation of settlement, and substituting therefor a provision denying that branch of the cross motion, and (2) by deleting the provision thereof denying that branch of the motion of Anthony Varone and Michele Myers which was to enforce the stipulation of settlement, and substituting therefor a provision granting that branch of the motion; as so modified, the order is *729 affirmed insofar as appealed from, without costs or disbursements.

In April 2016, Anthony Varone (hereinafter Anthony), as the grantor and a beneficiary of the Varone Irrevocable Trust (hereinafter the trust), and Michele Myers, as successor trustee and a beneficiary of the trust, commenced this proceeding pursuant to SCPA 2205 to compel the trustee, Richard B. Varone (hereinafter the trustee), to file an account for the trust. The trustee subsequently filed an account in the Surrogate's Court along with a petition to judicially settle the account. Thereafter, the parties entered into a stipulation of settlement dated December 8, 2016 (hereinafter the stipulation), signed and agreed to by the parties and their counsel, wherein it was agreed, inter alia, that Anthony and Myers would not object to the account on file so long as certain conditions of the stipulation were performed by December 31, 2016, including the transfer by the trustee of his interest in certain property located in Kings Park to the trust.

In March 2017, Anthony and Myers moved to enforce the stipulation and to remove the trustee from his position. The trustee opposed the motion and cross-moved, inter alia, to rescind the stipulation. Anthony subsequently died, and Myers, as the administrator of Anthony's estate, was substituted for Anthony. In an order dated November 3, 2017, the Surrogate's Court determined that **2 the stipulation was a binding agreement (*see* CPLR 2104), and that the language employed by the parties contemplated that the remedy available to Myers in the event the trustee did not fulfill his obligations under the agreement by December 31, 2016—the deadline for compliance with many of the provisions—was rescission of the stipulation. Accordingly, the court, in effect, granted that branch of the trustee's cross motion which was to rescind the stipulation and denied the motion to enforce the stipulation and to remove the trustee. Myers appeals.

"Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]), "especially where the parties are represented by counsel" (*Matter of Mercer*, 113 AD3d 772, 774 [2014]). A stipulation of settlement is a contract, enforceable according to its terms. When interpreting a contract, the construction

arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Matter of Christie*, 152 AD3d 765, 767 [2017]).

*730 Here, the stipulation "clearly and unambiguously" (*Vider v Vider*, 46 AD3d 673, 674 [2007]) provided that the trustee would, inter alia, "transfer his interest as remainderman . . . to real property located at 75 Ninth Ave., Kings Park, NY to the Trust by Quit Claim Deed . . . by or before 12/31/16." The trustee's failure to comply with this provision by the deadline of December 31, 2016, was not grounds to rescind the stipulation.

Reading the stipulation as a whole, the interpretation of the Surrogate's Court was not a reasonable reflection of the parties' intent. Although paragraph 12 of the stipulation expressly provided for Myers's "right to take [the trustee's] deposition and file objections" should the stipulation not be complied with by December 31, 2016, nowhere in the stipulation does it state that this was Myers's sole or exclusive remedy in the event of the trustee's default, or that the remedy for noncompliance with the stipulation was rescinding it (*see GEM Holdco, LLC v RDX Tech. Corp.*, 167 AD3d 491, 492 [2018]; *see also Coizza v 164-50 Crossbay Realty Corp.*, 37 AD3d 640 [2007]). Reading the stipulation as a whole, there is nothing to suggest that Myers intended to surrender her contractual right to compel the trustee to comply with his obligations under the stipulation. Finally, the trustee failed to show that there was cause sufficient to invalidate the stipulation, such as fraud, collusion, mistake, or accident (*see Racanelli Constr. Co., Inc. v Tadco Constr. Corp.*, 50 AD3d 875, 876 [2008]).

Since Myers demonstrated that the parties stipulated to settle the instant proceeding, and since the trustee did not show any reason to invalidate the stipulation, the Surrogate's Court should have granted that branch of the motion which was to enforce the terms of the stipulation and denied that branch of the trustee's cross motion which was to rescind the stipulation (*see Bethea v Thousand*, 127 AD3d 798, 799-800 [2015]).

However, contrary to Myers's contention, the Surrogate's Court properly denied that branch of the motion which was to remove the trustee (*see* SCPA 711, 719; *Matter of Duke*, 87 NY2d 465 [1996]; *Matter of Mercer*, 113 AD3d 772 [2014]). Dillon, J.P., Hinds-Radix, Duffy and Wooten, JJ., concur.

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154 A.D.3d 633
Supreme Court, Appellate Division,
First Department, New York.

In Re TURNOVER PROCEEDING,
Estate of Fay Solomon, Deceased.
Bruce Solomon, et al., Petitioners–Respondents,
v.
Mae Marlow, Respondent–Appellant.
In re Probate Proceeding, Will
of Leon **Hernesh**, Deceased.
Mae Marlow, Petitioner–Appellant,
v.
Bruce Solomon, et al., Respondents–Respondents,
Office of the Attorney General, Respondent.

Nos. 4836, 4837.
|
File No. 1568/12A.
|
Oct. 31, 2017.

Attorneys and Law Firms

McCarthy Fingar LLP, White Plains (Robert H. Rosh of counsel), for appellant.

Law Offices of Joanne Fanizza, P.A., Bay Shore (Joanne Fanizza of counsel), for Bruce Solomon and Joanne Fanizza, respondents.

Radin and Kleinman, West Nyack (Abraham N. Kleinman of counsel), for Diskin Orphan Home of Israel, respondent.

Opinion

Order, Surrogate's Court, Bronx County (Nelida Malave–Gonzalez, S.), entered on or about August 11, 2016, which, inter alia, denied petitioner Mae Marlow's motion to vacate a May 7, 2016 written stipulation and an October 13, 2015 so-ordered stipulation, and granted respondent Bruce Solomon's cross motion to enforce said stipulations, unanimously affirmed. Order, same court and Justice, entered on or about September 13, 2016, which denied respondent Marlow's motion for the aforementioned requested relief, and granted petitioner Solomon's cross motion for the aforementioned requested relief, unanimously affirmed, without costs.

It is undisputed that the stipulations were in writing, signed by Marlow's counsel, entered into in open court, and that the later stipulation was so-ordered. Thus, they are enforceable pursuant to CPLR 2104 (*see Hallock v. State of New York*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 474 N.E.2d 1178 [1984]). Moreover, Marlow cloaked her attorney with apparent authority to negotiate and enter into the settlements in that the firm represented her in the litigation over many years, and she confirmed to the court attorney in telephone conversations, while negotiations were ongoing, that counsel was authorized to settle on the terms discussed (*see Daniels v. Concourse Animal Hosp.*, 41 A.D.3d 284, 836 N.Y.S.2d 879 [1st Dept.2007]).

The stipulations were sufficiently definite and were more than agreements to agree in that what was promised was easily ascertainable and the later stipulation expressly stated that no further documents were necessary to effectuate the settlement (*see Yan's Video v. Hong Kong TV Video Programs*, 133 A.D.2d 575, 578, 520 N.Y.S.2d 143 [1st Dept.1987]).

We have considered Marlow's remaining arguments and find them unavailing.

RICHTER, J.P., WEBBER, KERN, MOULTON, JJ., concur.

All Citations

154 A.D.3d 633, 62 N.Y.S.3d 793 (Mem), 2017 N.Y. Slip Op. 07568

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