Unreported Disposition

7 Misc.3d 1013(A)

(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Kings County, New York.

PHOKUS GROUP, INC., Plaintiff,

v.

CALCON, INC., Saint Vincent's Comprehensive Cancer Center, and Salick Health Care, Inc., Defendants.

No. 43532/03. April 20, 2005.

Opinion

FRANCOIS A. RIVERA, J.

*1 By notice of motion dated September 20, 2004, plaintiff, The Phokus Group (hereinafter TPG) moves for an order compelling the defendants Saint Vincent's Comprehensive Cancer Center (hereinafter SVCCC), and Salick Health Care, Inc. (hereinafter SHC) to comply with a stipulation of settlement or, in the alternative, for a judgment against SVCCC and SHC in the amount of $4,550.00. TPG also seeks an order imposing sanctions against SVCCC and its counsel, John Harris (Harris) for refusal to comply with the stipulation. SVCCC and SHC cross move for an order denying the motion, dismissing the action against them and for sanctions against TPG. TPG opposes the cross motion.

TPG is a New York corporation engaged in the construction contracting business. On November 5, 2003, TPG's commenced this action by filing a summon, verified complaint and a notice of pendency with the Kings County Clerk. On December 22, 2003, Harris, an attorney with Epstein Becker & Green, P.C. answered plaintiff's complaint on behalf of SVCCC and SHC.

TPG's summons and verified complaint makes the following allegations of fact. On January 30, 2003, Calcon Inc., (Calcon) hired TPG as a subcontractor to do construction work on a premise owned by SVCCC and SHC located at 325 West 15th street, New York, New York. During the 7th through the 10th of February, 2003, TPG furnished labor and materials to improve the property. Calcon owes TPG four thousand five hundred dollars ($4,550.00) for the labor and materials provided.

In the instant motion, TPG alleges the following. On May 11, 2004, after several discussions and exchange of draft agreements, **Ronald Francis (Francis)**, counsel for TPG, forwarded to Harris four duplicate stipulations of settlement by hand. He also forwarded an executed stipulation of partial discontinuance and executed general releases in favor of SVCCC and SHC. On June 16, 2004, Harris issued a letter by facsimile transmission to Francis, requesting TPG's tax identification number in order to issue the settlement check. Francis wrote the tax identification number on the letter Harris sent and returned it by facsimile transmission to him. On June 22,2004, Francis received two email transmissions from the defendants requesting a W–9 form confirming TPG's tax identification number. On June 23, 2004, Francis submitted the W–9 form by facsimile

transmission to the defendants. On July 8, 2004, Harris sent Francis an executed copy of the settlement agreement on behalf of SVCCC and SHC, and a copy of the settlement check. On July 12, 2004, Francis filed a satisfaction of lien. On July 14, 2004, he sent Harris by facsimile transmission a copy of the satisfaction of lien. The document contained a stamp which stated "Filed, County Clerk, New York County" and which was dated July 12, 2004. He also sent Harris a stipulation canceling a lis pendens which bore a stamp stating "docketed July 13, 2004 Kings County Clerk." Francis also sent Harris his affirmation stating that no other liens had been filed on behalf of plaintiff on SVCCC. On July 29,2004, Francis forwarded to Harris a computer print out from the New York County Clerk mechanic's lien desk showing that the lien filed by TPG which was date stamped on February 20, 2003 was filed in New York County on February 20, 2003 and satisfied on July 13, 2004.

*2 Defendants SVCCC and SHC by their counsel Harris cross move to dismiss plaintiff's complaint and for sanctions for bringing the instant motion. In support of the cross motion, Harris alleges that TPG's cause of action should be dismissed because it was brought in Kings County instead of New York County. He further alleges that TPG did not comply with a condition precedent to the agreement, namely, to present to the defendant on or before June 20, 2004 with proof that the notice of lien was voided of record.

CPLR § 5003(a) provides for prompt payment following settlement:

> When an action to recover damages has been settled, any settling defendant, except those defendants to whom subdivisions (b) and (c) of this section apply, shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff. (Subdivision (b) concerns municipalities and subdivision (c) concerns the state.)

CPLR § 5003(e) provides:

> In the event that a settling defendant fails to promptly pay all sums as required by subdivisions (a), (b), and (c) of this section, any unpaid plaintiff may enter judgment, without further notice, against such settling defendant who has not paid. The judgment shall be for the amount set forth in the release, together with costs and lawful disbursements, and interest on the amount set forth in the release from the date that the release and stipulation discontinuing action were tendered.

CPLR § 3018(a) concerns responsive pleadings and provides:

> Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.

Defendant's SVCCC and SHC did not deny the following salient allegations of fact made by TPG in the instant motion. On June 16, 2004, Harris issued a letter by facsimile transmission to Francis, stating that his client needed a tax identification number to issue the settlement check. Francis wrote the tax identification number on the very letter received

and returned it by facsimile transmission back to Harris. On July 8, 2004, Harris sent Francis an executed copy of the settlement agreement on behalf of SVCCC and SHC, and a copy of the settlement check. On July 14, 2004, he sent Harris by facsimile transmission a copy of the satisfaction of lien. It contained a stamp which stated "Filed, County Clerk, New York County" and which was dated July 12, 2004. Also sent was a stipulation canceling a lis pendens which bore a stamp stating "docketed July 13, 2004 Kings County Clerk." Francis also sent Harris his affirmation stating that no other liens had been filed on behalf of plaintiff on SVCCC.

*3 Pursuant to CPLR § 3018(a), these allegations of fact are deemed admitted. Also, SVCCC and SHC do not deny that the parties executed the stipulation of settlement annexed as exhibit H to TPG's motion. The stipulation covered all issues contained in the underlying action between TPG and SVCCC and SHC. By its terms, all claims between TPG and SVCCC and SHC were to be resolved by the stipulation. Plaintiff avers full compliance with its terms and seeks enforcement of its alleged entitlement to $4,500.00.

CPLR § 507 concerns real property actions and provides:

> The place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.

Defendants, on the other hand, contend that this court lacks jurisdiction to hear the motion and the underlying action because TPG should have brought them in New York County. While the subject property is indeed in New York County, the fact that the action to foreclose a mechanic's lien was brought in Kings County does not warrant dismissal. At most, this fact would support a motion to change venue pursuant to CPLR 511(b) but would not divest this court of personal and subject matter jurisdiction. It is noted that defendants did make a motion to change the place of trial. Furthermore, the defendants, by entering into a stipulation of settlement after the underlying action was commenced, waived the issue of improper venue. Defendants' motion to dismiss the motion and underlying action on the grounds of improper venue is without merit and denied.

On November 17, 2004, this court ordered an evidentiary hearing on plaintiff's motion and defendant's cross motion, pursuant to CPLR § 2218, on the issue of whether plaintiff filed a satisfaction of judgment and provided copy of same to defendants' counsel. Before ordering the hearing, this court advised the parties on the record that based on the allegations contained in the motion papers, it appeared that defendants opposition and cross motion were frivolous. The parties were urged to discuss the matter and advise the court if an evidentiary hearing was still necessary before the scheduled hearing date. Defendants disregarded the courts warning and chose to continue the proceedings Testifying for the plaintiff was James A. Rossetti, the chief deputy county clerk of the New York County clerk's office Testifying for the defendant was Ivan Lopez and Christopher Diaz, from the office of defendants' counsel. At the conclusion of the hearing, the court finds that on July 12, 2004, TPG's counsel, Francis, filed a satisfaction of lien. The New York County Clerk's office staff recorded the satisfaction of lien, entered the data into its computer and then lost the original papers. Thereafter, defendants could not locate the original papers when it sought them in the clerk's office. The defendants knew that the clerk's office lost the satisfaction of lien and used that fact to withhold payment to TPG. On August 16, 2004, plaintiff attempted to provided the defendants with a duplicate original of the satisfaction of lien so that the defendants could file it again. That offer was rejected.

*4 TPG contends that it completely complied with the terms of the stipulation and defendants breached their part of the bargain by withholding payment of the $4,500.00 due to them. Defendants allege that TPG failed to perform it obligation to provide them by June 20, 2004 with proof that it filed a cancellation of the lis pendens. Defendant contends that this failure caused the stipulation to expire. However, on July 8, 2004, Harris sent Francis an executed copy of the settlement agreement on behalf of SVCCC and SHC, and a copy of the settlement check. Harris' conduct establishes that defendants were not treating the agreement as if time were of the essence (*William Towne Associates, Inc. v. Pegasus Const., Inc.,* 286 A.D.2d 246 [1st Dept.2001]). Furthermore, Harris' conduct demonstrated that it waived any claim to the untimeliness of TPG's compliance by continuing to seek compliance after the passage of the alleged July 20, 2004 deadline.

Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce (*Edgewater Const. Co., Inc. v. 81 & 3 of Watertown, Inc.,* 1 AD3d 1054–1058 [4th Dept.,2003]).Stipulations of settlement are favored by the courts and not lightly cast aside (*Hallock v. State,* 64 N.Y.2d 224–230 [1984]). The court finds that the stipulation of settlement was valid and enforceable and that TPG fully complied with its terms. The court further finds that Harris knew that the New York County clerk's office had lost the satisfaction of lien filed by TPG and attempted to exploit this fact to avoid its end of the bargain. Defendants breached the agreement by refusing to release the settlement check to TPG. On January 6, 2005, the court ordered defendants to provide TPG with the $4,500.00 settlement check forthwith and advised the parties that a decision would follow.

The court reserved decision on TPG's request for sanctions pending receipt of the parties submission of evidence of the cost to counsel of pursuing the enforcement of the stipulation. The court directed TPG to serve defendants with an affirmation setting forth the cost and attorneys fees incurred in bringing the instant motion and directed defendants to file any opposition to same pursuant to a schedule. Both parties complied.

Pursuant to the Rules of the Chief Administrator of the Courts Part 130 as set forth in 22 NYCRR 130–1.1(a), the court may award to any party or attorney in a civil matter costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees, resulting from frivolous conduct.

For the purpose of this Part conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.
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> *5 Frivolous conduct shall include the making of a frivolous motion for cost and sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

If a court awards costs or sanctions, it must be done in a written decision setting forth the offending conduct, why that conduct has been deemed frivolous and why the amount

awarded is appropriate (*Breslaw v. Breslaw,* 209 A.D.2d 662[2nd Dept 1994]). The decision as to whether to award sanctions is within the sound discretion of the court (*Wagner v. Goldberg,* 293 A.D.2d 527 [2nd Dept.2002]). In order to impose sanctions, the court must find that defendant's motion asserts material falsehoods or is without legal merit and undertaken primarily to delay or prolong the litigation, or to harass or maliciously injure another (*Knoff v. Johnson,* 5 Misc.3d 1003 [NY Sup 2004]).

Defendants cross motion to dismiss the TPG's instant motion and the underlying action based on improper venue was completely without factual or legal merit. There is no authority for dismissal of a cause of action or a motion on this basis. Furthermore, defendants entered into a stipulation of settlement of the underlying cause of action which operated as a waiver of the procedural claim of improper venue. Defendant's application for sanctions against TPG for bringing the action and the instant motion was also completely without factual or legal merit.

The credible evidence established by the evidentiary hearing ordered by the court establishes that TPG fully complied with the terms of the stipulation. Defendants, on the other hand, knew that the staff of the New York County clerk's office had lost the satisfaction of lien filed by TPG and attempted to exploit this fact to avoid its end of the bargain.

Defendant's conduct in repudiating its agreement, forcing the plaintiff to seek enforcement of same and offering meritless defenses and cross motions was conduct designed to prolong or delay its obligation to the pay TPG the $4,500.00 owed to them. The conduct is frivolous and merits sanctions. The amount defendants owed TPG is not substantial. It thus appears that defendants engaged in this wasteful litigation hoping that plaintiff would choose to forego pursuit of a valid debt because the legal cost of its pursuit would be nearly as great as the amount of the debt. It is also noted that the court forewarned defendants of the apparent frivolousness of its pleadings. The court reviewed the affirmation of TPG's counsel and the objections to same by defendants counsel. The court finds the amounts set forth therein to be reasonable. For the foregoing reasons TPG's request for sanctions is granted and they are awarded the amount of six thousand eight hundred and forty six dollars and seventy five cents ($6,846.75) representing the reimbursement for actual expenses reasonably incurred and reasonable attorney's fees (*Cooper v. Mansfield,* 6 Misc.3d 402 [NY Sup 2004]).

*6 The foregoing constitutes the decision and order of the court.

Parallel Citations

7 Misc.3d 1013(A), 801 N.Y.S.2d 241 (Table), 2005 WL 927010 (N.Y.Sup.), 2005 N.Y. Slip Op. 50585(U)