

5-6-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

175 MULBERRY REALTY, LLC,

Plaintiff,

- against -

KAM CHEUNG CONSTRUCTION, INC. and
TOMMY TSANG,

Defendants.

INDEX NO. 112076/2007

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment.

FILED

MAY 06 2010

NEW YORK COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: Yes No

This is a breach of contract action by plaintiff 175 Mulberry Realty, LLC ("plaintiff") against defendants Kam Cheung Construction, Inc. ("KCC") and Tommy Tsang (collectively "defendants"), arising from a contract to build a new mixed-use building on plaintiff's property. On March 17, 2008, the parties executed an amended contract that purported to settle the case and further required plaintiff's counsel to file a stipulation discontinuing the action. Plaintiff has refused to authorize his counsel to sign and file a stipulation of discontinuance. The parties completed discovery and a Note of Issue was filed on February 2, 2010. Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the action in accordance with the terms of the amended contract, or, alternatively, compelling plaintiff to execute and file the stipulation of discontinuance. Plaintiff has responded in opposition to the motion, and defendants have filed a reply.

BACKGROUND

In support of their motion for summary judgment, defendants submit, *inter alia*, copies of the original contract and amended contract; and letters from defendants' counsel to plaintiff's counsel dated March 18, 2008 and April 3, 2008. Plaintiff submits his own affidavit in opposition to the motion. The undisputed facts are as follows.

Plaintiff is the owner of real property known as 175 Mulberry Street, New York, New York ("the Property"). KCC is a general contractor and Tsang is its principal. Pursuant to a written contract executed on September 25, 2005 ("the Contract"), KCC was retained by plaintiff to construct a new building on the Property ("the Project").

Following substantial completion of the Project, the parties became embroiled in various disputes that resulted in nonpayment by plaintiff to KCC as required under the Contract. KCC discontinued work at the Project and gave notice that it was terminating the Contract for nonpayment. Plaintiff thereafter brought the present action against defendants seeking damages for breach of contract. Defendants answered and counterclaimed for damages for work performed under the Contract that remained unpaid. KCC also filed a mechanic's lien against the Property.

After extensive negotiations between the parties and their respective counsel, plaintiff and KCC executed an amendment to the contract ("the Contract Amendment") on March 17, 2008, pursuant to which the parties purported to settle their respective claims asserted in this action. The Contract Amendment, *inter alia*, established a time line for the parties to complete the Project, to remove KCC's mechanic's lien, and to make payments due under the Contract. The Contract Amendment also required plaintiff's attorney to hold funds in escrow pending issuance of a final Certificate of Occupancy. In addition, paragraph 5 of the Contract Amendment required the parties to execute and file a stipulation discontinuing the present action, providing:

"Upon the execution of this Amendment, the attorneys for Owner shall prepare a Stipulation Discontinuing Action and Counterclaims in form as annexed hereto as Exhibit B, it shall be signed by the attorneys for Owner and Contractor and the attorneys for Owner shall file such document forthwith and provide a court-stamped copy to the attorney for Contractor" (Not. of Mot., Ex.).

Following execution of the Contract Amendment, defendants' counsel signed a Stipulation Discontinuing Action ("the Stipulation") and forwarded it to plaintiff's counsel for signature on March 18, 2008. Plaintiff's counsel refused to sign and file the Stipulation.

In his affidavit in opposition, plaintiff concedes that the parties attempted to settle the action, but he submits that under their agreement defendants were required to complete construction and to obtain a Certificate of Occupancy for a five-story mixed-use building. He alleges that defendants failed to complete construction or to obtain a Certificate of Occupancy, and that as a result he did not permit his counsel to sign the Stipulation or to agree to discontinue the action.

Defendants, in reply, submit the affidavit of KCC's Vice President, Karen Qiao, asserting that KCC resumed work at the Property in March 2008, based on a belief that the lawsuit would be discontinued. Defendants also claim that KCC in fact completed all of its work on the Project as of April 3, 2009, and that plaintiff's inability to obtain a Certificate of Occupancy was due to its own failure to pay its architect and plumber.

DISCUSSION

Defendants argue that they are entitled to summary judgment dismissing this action because the execution of the Contract Amendment alone effectively discontinued the case, leaving only the ministerial task of filing the Stipulation that plaintiff's counsel was required to do "forthwith." They claim that the Contract Amendment was not conditioned upon any further performance by the parties. They also contend that plaintiff's counsel has no lawful basis for refusing to file the Stipulation, and, as an alternative to dismissal, they request an order

compelling plaintiff's counsel to execute and file the Stipulation in accordance with paragraph 5 of the Contract Amendment.

Plaintiff responds that summary judgment should be denied since the Stipulation is unsigned and thus unenforceable. He argues that the original action must continue as he has suffered damages due to defendants' alleged failure to complete construction and to provide a Certificate of Occupancy as agreed.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, it is undisputed that the Stipulation was never signed by plaintiff's counsel and filed with the Court. Therefore, even though the parties executed the Contract Amendment purporting to settle the case, their agreement does not terminate this action (*see Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 53 [1979] ["A settlement agreement entered into by parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement."]); *Noble v O'Leary*, 165 Misc 2d 231, 235 [NY Co. 1995] [stipulation of discontinuance that was not filed with the court was of no effect]; *Scholtz v Catholic Health Sys. of Long Island, Inc.*, 2008 WL 4821334, *8 [Suffolk Co. 2009]). This Court thus retains its supervisory power over this action and has discretion to enforce a stipulation of settlement (*see Transportation House, Inc. v E.D.V. Maintenance Corp.*, 84 AD2d 534, 535 [2d Dept 1981]).

With regard to the purported settlement, settlement agreements, which are judicially favored and should not be lightly cast aside, are considered contracts and are governed by the same principles of interpretation and enforceability (*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 [2009]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Defendants have failed to establish that, as a matter of law, they are entitled to enforcement of the purported settlement agreement or an order compelling plaintiff's counsel to sign and file a stipulation of discontinuance. There remain questions of fact regarding whether the Contract Amendment (which was not done in open court) is a valid settlement agreement intended to settle all of the claims in this action. Although the Contract Amendment requires the signing and filing of a stipulation of discontinuance with the Court, it is unclear from the four

corners of the document if the parties intended to discontinue all claims in this lawsuit regardless of whether defendants complete construction or obtain a Certificate of Occupancy, or whether their agreement requires that these conditions be met as a condition of discontinuance. There are also issues of fact regarding whether defendants have in fact completed construction, or failed to provide a Certificate of Occupancy. Accordingly, defendants' motion for summary judgment is denied.

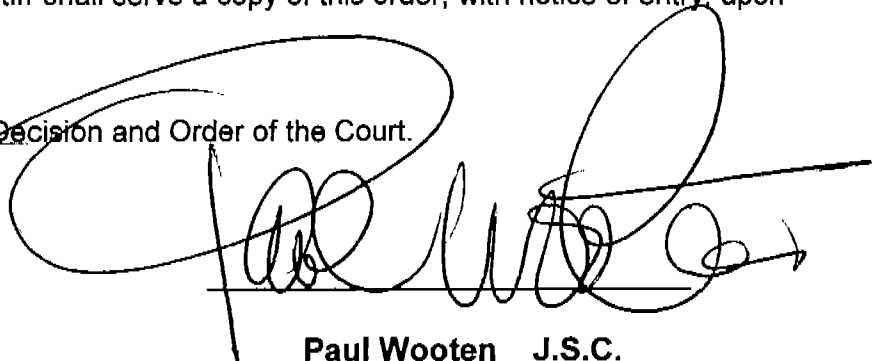
For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion for summary judgment is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendants.

This constitutes the Decision and Order of the Court.

Dated: ^{MAY} ~~April~~ 5, 2010



Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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