

**Independent Temperature Control Servs., Inc. v
Stellar Mechanical Services of N.Y., LLC II**

2012 NY Slip Op 30500(U)

February 10, 2012

Supreme Court, Queens County

Docket Number: 23971/09

Judge: Martin J. Schulman

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARTIN J. SCHULMAN
Justice

T S P

INDEPENDENT TEMPERATURE
CONTROL SERVICES, INC.,

Index No.: 23971/09

Motion Date: 11/22/11

Plaintiff,

Motion Seq. No.: 2

-against-

STELLAR MECHANICAL SERVICES OF
N.Y., LLC II, FLUSHING TOWN CENTER
II, LP, FTC II GR, LLC, C.E. FLUSHING, LLC,
CELTIC SHEET METAL, INC., CELTIC
SHEET METAL, INC., OROHYPO AG, BED
BATH AND BEYOND, INC. HOME DEPOT USA,
INC., BEST BUY STORES, LP, MARSHALLS OF
MA, INC. STAPLES THE OFFICE SUPERSTORE
EAST, INC. BJ'S WHOLESALE CLUB, INC.,

Defendants.

The following papers numbered 1 to 11 read on this motion by defendant Stellar Mechanical Services of N.Y. LLC II (Stellar), for an order pursuant to CPLR §2104 enforcing a settlement agreement dated May 20, 2010, and for reasonable attorney's fees and costs, pursuant to 22 NYCRR §130-1.1.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-5
Opposing Affirmation-Affidavits-Exhibits.....	6-9
Memorandum of Law.....	10
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Upon the foregoing papers it is hereby ordered that this motion by defendant Stellar Mechanical Services of N.Y., LLC II ("Stellar"), for an order pursuant to CPLR

§2104 to enforce a settlement agreement dated May 20, 2010, and granting it reasonable attorney's fees and costs, pursuant to 22 NYCRR §130-1.1., is denied, as follows:

Plaintiff, Independent Temperature Control Services, Inc. ("ITCS") commenced this action in September, 2009 alleging breach of contract, account stated, and lien foreclosure for damages arising out of work performed by it for defendant Stellar. The first cause of action for breach of contract alleges that plaintiff entered into an agreement with Stellar on April 12, 2008, whereby it agreed to furnish and install a stand alone automatic temperature control system for Stellar at the Flushing Town Center. Plaintiff alleges that it furnished materials and labor, in the sum of \$106,000.00; that the contract was orally terminated by Stellar on July 23, 2008; that Stellar advised plaintiff that it had retained another contractor to complete the work; and that Stellar failed to pay ITCS the sum of \$106,000.00 for the work performed. The second cause of action alleges an account stated in the sum of \$106,000.00 for the work performed at Flushing Town Center. The third cause of action seeks to recover the sum of \$109,264.00 in lost profits for the work remaining at Flushing Town Center. The fourth cause of action seeks to foreclose a mechanic's lien.

The fifth cause of action for breach of contract alleges that ITCS entered into a contract with Stellar on January 31, 2009, whereby ITCS agreed to provide materials and/or labor to Stellar, at another construction project known as 75 Smith Street, for the sum of \$18,715.00, and that Stellar has failed to pay said amount. The sixth cause of action alleges another account stated in the sum of \$18,715.00, with respect to the 75 Smith Street project.

On September 25, 2009, the mechanic's lien was discharged, when Stellar deposited the sum of \$107,646.63 with the Clerk of the Court. Stellar's answer and counterclaims are not on file with the court, although plaintiff's reply to the counterclaims are on.

The court, in an order dated August 2, 2010, dismissed the complaint against co-defendants Bed Bath and Beyond, Best Buy Stores LP, Marshalls of MA, Inc., Staples the Office Superstore East, Inc. and BJ's Wholesale Club, Inc. All claims against defendant Celtic Sheet Metal, Inc., a/k/a Celtic Sheet Metal Inc., were resolved pursuant to a stipulation and order dated March 15, 2011, and filed on April 20, 2011, which directed the distribution of funds to be paid into court.

Stellar now seeks, pursuant to CPLR § 2104, to enforce a settlement agreement it entered into with ITCS on May 20, 2010. The purported agreement states as follows:

"May 20, 2010 **RE: Flushing Town Center** Balance Due to ITC Independent Temperature Control Services Inc. from Stellar Mechanical \$55,000.00 as agreed".

The agreement was signed by Bernard Flynn (“Flynn”) the president of ITCS, and Tommy Andreadakis (“Andreadakis”), Stellar’s managing member.

In a letter from Flynn dated May 26, 2010, addressed to Andreadakis, (six days after the settlement agreement), Flynn confirmed the May 20, 2010 meeting and the agreement as having resolved this action and another action involving another entity Danica Group LLC. With respect to the Flushing Town Center Project, Flynn stated that “ITCS and Stellar had agreed to resolve ITC’s claim for a total sum of \$55,000.00 which Stellar will pay to ITCS on or about June 4, 2010. As further agreed, on May 20, 2010, ITCS has directed its attorney’s to prepare, serve, and file a Satisfaction of the Mechanic’s Lien pursuant to our agreement, which is being prepared now”.

Flynn’s letter also delineated the parties’ agreements regarding the 75 Smith Street Project, and the Danica Group Project, and requested that Andreadakis confirm that the letter accurately memorialized their understanding and the agreement of May 20, 2010 by executing and returning the letter. Andreadakis never executed nor returned the May 26, 2010 letter to Flynn.

In a second letter dated June 10, 2010 addressed to Andreadakis, Flynn withdrew the settlement and demanded the immediate return of the satisfaction of the lien, alleging that Stellar had breached the settlement agreement and failed and refused to pay the agreed settlement amount. This agreement referred to the index number of this action and to the index number of the action commenced against Danica Group LLC.

In a letter dated June 15, 2010, addressed to the County Clerk, counsel for ITCS advised that although ITSC had provided Stellar with a satisfaction of lien, Stellar had failed to pay the settlement monies, and that the court should not file the satisfaction of the lien, if presented for filing by Stellar. A copy of this letter was sent to Stellar’s counsel and to counsel for then co-defendant Celtic Sheet Metal.

In his affirmation in support of this motion, counsel for Stellar states that upon receipt of the copy of ITCS’s letter to the County Clerk, he contacted counsel for ITCS and sought to make payment arrangements, but that counsel for ITCS indicated that it would not honor the May 20, 2010 agreement unless it was granted more favorable terms, on the alleged basis that Stellar had not made payment. Counsel states that over the past year he has sought to effectuate the May 20, 2010 agreement, but that ITCS has refused to honor any settlement that did not include full payment on seven other unrelated construction projects.

In his affidavit in support of the motion, Andreadakis states that on May 20, 2010, he attempted to settle all of ITCS’ claims against Stellar and against Danica Group LLC

with Flynn; that they were unable to reach a global settlement of all of ITCS' claims, and that they agreed to settle only ITCS' claims concerning the project at Flushing Town Center, in the amount of \$55,000.00; that at the May 20, 2010 meeting, it was agreed that ITCS would be paid the \$55,000.00 settlement payment from the funds that had been deposited into the court; and that ITCS refused to cooperate with his attorneys to secure a court order for the deposited funds. Andreadakis further claims to have no recollection of receiving the May 26, 2010 letter.

In opposition to the motion, ITCS asserts that the May 20, 2010 agreement is unenforceable, as it was unequivocally rescinded, cancelled and rendered null and void by Bernard Flynn in his letter of June 10, 2010 to Stellar; that Flynn was fraudulently induced to enter into the May 20, 2010 agreement; that Stellar failed to pay the sum of \$55,000.00 by June 4, 2010, the agreed upon deadline; that the May 20, 2010 writing is ambiguous, as it does not contain material terms or consideration; that extrinsic evidence is necessary to ascertain the intent of the parties; that the conduct of the parties after May 20, 2010, is inconsistent with a settlement, as they continued to litigate the matter for the next 17 months, and conducted discovery regarding Flushing Town Center.

Absent a termination of an action, a party who believes a stipulation has been reached may move for enforcement thereof in the pending action (*See, e.g., Crecca v Narofsky, 41 AD3d 216 [2007]*). To be binding, stipulations of settlement must comply with CPLR § 2104, and will not be enforced unless made in open court or contained in a writing subscribed by the parties or their attorneys. (*See, e.g., Peralta v All Weather Tire Sales & Service, Inc., 58 AD3d 822, 873 [2009]*). CPLR § 2104 further provides that “[w]ith respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of the stipulation of settlement shall be filed by the defendant with the County Clerk. The court notes that the purported May 20, 2010 stipulation of settlement was never filed by the defendant with the County Clerk in compliance with CPLR § 2104.

New York has a strong policy of promoting settlements (*see, Hallock v State of New York, 64 NY2d 224*). However, “[I]f settlements, once entered are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord (*see, Bonnette v Long Island College Hosp., 3 NY3d 281, 286 [2004]*), “since these concerns lie at the heart of CPLR § 2104, a neutral statute enacted to promote certainty in settlements, which benefits all litigants” (*see Bonnette, supra, at 281*).

Furthermore, a stipulation of settlement is a contract subject to the principles of

contract interpretation (*Rainbow v Swisher*, 72 NY2d 106 (1988); *Howard v Howard*, 292 AD2d 345 [2002]) and is enforceable according to its terms. See, *Al Shawhati v Ziandani*, 82 AD3d 805; *McKenzie v Vintage Hallmark*, 302 AD2d 503. As with any contract, if an agreement is not reasonably certain in its material terms, it cannot be legally enforceable, and an agreement to agree is unenforceable (see, *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105[1981]; *Trueforge Global Mach. Corp. v Viraji*, 84 AD3d 938).

Here, the court finds that the May 20, 2010 writing, is, at best, fatally indefinite and vague regarding the material and substantial terms of payment on the part of Stellar, as it does not set forth a promise to pay, a date of performance or any event triggering performance, and does not state how payment was to be effectuated. (see, generally, *Marlio v McLaughlin*, 288 AD2d 97, 99 [2001]). In this case, Stellar seeks to have the court add a new and different substantive term that the parties must have foreseen, but either neglected or refused to include in their purported agreement. It would be inappropriate for the court to rewrite the terms of the May 20, 2010 writing in the guise of interpretation (see, *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]; *Etzion v Etzion*, 84 AD3d 1010), since “the court’s role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert”. (See, *Maser Consulting, P.A. v Viola Park Realty, LLC*, __ AD3d ____, 2012 NY Slip Op. 498, January 24, 2012 (2nd Dep’t), quoting, *WWW Assoc. v Giancontieri*, supra.

Accordingly, Stellar’s motion to enforce the May 20, 2010 agreement, and for reasonable counsel fees and costs is denied.

This constitutes the order and decision of the court.

This case is scheduled for trial on March 8, 2012, at 9:30 A.M.

Dated: February 10, 2012

J.S.C.