STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

HEINRICH R. VONRITTER,

Plaintiff,

-against-

CITY OF HUDSON,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 10-04-0027 Index No. 6943-03

Appearances: The Baynes Law Firm, PLLC
Attorneys For Plaintiff
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DECISION/ORDER

George B. Ceresia, Jr., Justice[1]

The above-captioned action was commenced by plaintiff with regard to the maintenance of defendant's stormwater/sewage system which runs through plaintiff's real property.[2] Plaintiff asserted that the stormwater/sewage system was negligently maintained, resulting in the flooding of his property. The matter went to trial in 2007. The jury apportioned liability 25% to defendant and 75% to plaintiff. The jury further found

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[1]The action was originally assigned to County Court Judge Paul Czajka, as Acting Supreme Court Justice. Upon his resignation as County Court Judge in 2011, the case was reassigned to the undersigned.

[2]The real property consists of 0.819 acre of land located at 221-227 Tanners Lane, City of Hudson, Columbia County.

however, that the plaintiff suffered no financial loss. The parties subsequently entered into a stipulation which required the defendant to make the stormwater/sewer system fully operational. In November 2008 the plaintiff made a motion in which he alleged that the defendant had failed to comply with the parties' stipulation. That application ultimately resulted in a second stipulation which was "so-ordered" by Acting Supreme Court Justice Czajka on April 2, 2009 (hereinafter, the "Stipulation"). The Stipulation required the parties to engage in a process to establish the value of plaintiff's real property, followed by purchase of the property by the defendant. The Stipulation contained a provision permitting the defendant to conduct an environmental study of the property, which also recited that if the cost of environmental remediation exceeded the sum of $15,000.00, that the defendant could unilaterally terminate the Stipulation.

Pursuant to the valuation procedure set forth in the Stipulation, the defendant, within 30 days of completion of the environmental study, was required to retain an appraiser. Upon receipt of defendant's appraisal, the plaintiff had the right to retain his own appraiser to prepare a separate appraisal. The Stipulation further stated:

> "(f) Should the plaintiff and defendant not be able to arrive at an agreed upon price for the property within the market value range of the appraisals performed by said appraisers, then said appraisers shall confer and select a third appraiser to evaluate the data and basis of the appraisals previously performed, and if said third appraiser deems necessary, gather any further data necessary to arrive at a 'conference appraisal' which shall occur based upon discussions and input from all appraisers. Said third appraiser's appraisal shall be binding upon the plaintiff and defendant. Said 'conference appraisal' shall be conducted within fifteen (15) days of plaintiff's transmittal of its appraisal to defendant[.]" (Stipulation, ¶ 1 [f])

Defendant apparently prepared and submitted two appraisals: one valuing the property at

$66,000.00, and one valuing the property at $50,000 (both, less the cost of environmental remediation).[3] The plaintiff then retained his own appraiser, who valued the property at $120,000.00. The plaintiff thereafter refused to participate in the process for selection of a third appraiser. Each of the parties subsequently made motions: the defendant, for an order confirming the valuation established by its appraisals; and the plaintiff, two motions, one for damages, and one for breach of contract.[4] Judge Czajka denied all motions, and determined that by reason of the impasse with respect to selection of a third appraiser, that he would make the selection, which he did, naming Michael J. Bernholz as the third appraiser. Mr. Bernholz thereafter reviewed the appraisals, and ultimately found the value of the property to be $50,000.00.[5] In the meantime, plaintiff filed an appeal of the decision-order and amended decision-order of Judge Czajka.

Subsequent to that, but before the Appellate Division issued its decision on the appeal, the defendant made a motion for an order directing the plaintiff to convey the property to the defendant, upon payment of the sum of $50,000.00. The plaintiff responded by, inter alia, cross-moving for a stay of the action pending the outcome of plaintiff's appeal. The Court, in a decision-order dated September 23, 2011 granted the cross-motion, and stayed the action until final disposition of the appeal.

On January 26, 2012 the Appellate Division issued a Memorandum and Order affirming the order and amended order of Judge Czajka, but on different grounds than that

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[3]It is not clear why two appraisals were prepared.

[4]As described in the Decision and Order of Hon. Paul Czajka dated September 27, 2010, and amended Decision and Order dated September 29, 2010.

[5]He conditioned the valuation upon an assumption: that no environmental remediation was necessary.

cited by Judge Czajka (see VonRitter v City of Hudson, 91 AD3d 1216). On February 6, 2012 the Court granted the parties twenty days to make a further submission with regard to the still-pending motion, specifically as to the applicability of the recent Appellate Division decision. Each party has done so.

As stated by the Appellate Division

> "The action between the parties was commenced in 2003 and ended with the entry of a judgment in 2007 following a jury trial. The judgment, among other things, dismissed plaintiff's causes of action for money damages. The motions by plaintiff underlying the current appeals were not made to enforce the judgment, but instead seek to have a court construe, enforce and award money damages regarding the separate stipulation entered into in March 2009. There is no action pending regarding that stipulation and "[a] motion must be addressed to a pending matter" (Matter of Village of Greenwood Lake v. Mountain Lake Estates, 189 AD2d 987, 987 [1993], lv. dismissed 81 NY2d 1006 [1993]). Accordingly, we affirm the denial of plaintiff's motions, albeit on a different ground than Supreme Court." (VonRitter v City of Hudson, 91 AD3d 1216, supra, at 1217).

Notably, defendant's motion is one to enforce the stipulation. The Court finds that the determination of the Appellate Division is the law of the case (see Scofield v Trustees of Union College, 288 AD2d 807, 808 [3d Dept., 2001]; Johnson v Waugh, 249AD2d 733, 734-735 [3d Dept., 1998]; Steck v Jorling, 227 AD2d 849, 851 [3d Dept., 1996]). Inasmuch as there is no action pending regarding the stipulation, the motion must be denied (see VonRitter v City of Hudson, supra).

Accordingly, it is

ORDERED, that defendant's motion be and hereby is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the plaintiff. All other papers are being delivered to the

Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: March 24, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated March 4, 2011, Supporting Papers and Exhibits
2. Notice of Cross-Motion dated March 28, 2011
3. Affidavit of John Connor, Jr., Esq., sworn to April 1, 2011
4. Letter dated February 13, 2012 of Carl G. Whitbeck, Jr., Esq.
4. Affidavit In Further Opposition to Defendant's Motion of Brendan F. Baynes, Esq., dated February 24, 2012