Samuel Realty LLC v Richardson
2017 NY Slip Op 31936(U)
September 12, 2017
Supreme Court, New York County
Docket Number: 654511/2016
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SAMUEL REALTY LLC,

Index No.: 654511/2016

Plaintiff,

DECISION & ORDER

-against-

CYNTHIA RICHARDSON, CHARLES BRIGGS, JACQUELINE ALEXANDER, MABEL JOHNSON, MARY BAILEY, HUBERT BAKER, CLIFTON ROBERTSON, SANDRA VALLEY, LINDA F. HARRIS, ERLENE ARTHURS a/k/a EARLENE ARTHURS and SURREY COOPERATIVE APARTMENTS, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

On April 10, 2017, plaintiff filed a motion to compel defendants to produce myriad categories of discovery. Seq. 006. By interim order dated July 19, 2017 (Dkt. 259), the court noted that the vast majority of the motion was resolved pursuant to rulings made in discovery conferences. After oral argument on August 15, 2017, the court reserved on the balance of the motion – which concerns whether defendant Erlene Arthurs, who was privy to attorney-client communications between the other defendants and their counsel, caused a waiver of the privilege. Immediately after argument, at a discovery conference, counsel for defendant Surrey Cooperative Apartments Inc., David Ostwald, made an unsolicited offer to plaintiff's counsel, Don Tellock, to resolve the motion by producing all of the documents on the two subject privilege logs, which are dated July 18, 2017. Mr. Tellock accepted this offer.

The court's law clerk memorialized this stipulation in writing, which was then reviewed by Mr. Tellock and Mr. Ostwald. *See* Dkt. 269. The writing stated that ***all*** the documents on the logs would be produced, and the word "all" was underlined. Mr. Tellock and Mr. Ostwald

signed the stipulation. The stipulation was to become effective if, after Mr. Ostwald conferred with his client, he obtained her consent.

After the conference, Mr. Ostwald informed Mr. Tellock that he procured his client's consent. However, Mr. Ostwald only produced to Mr. Tellock some of the document on the logs – i.e., not "all" of them. Mr. Ostwald refuses to comply with the stipulation and produce the rest of the documents, insisting instead that the court decide the privilege motion. Remarkably, on a telephone conference with the court, Mr. Ostwald again represented that he procured his client's consent, but still refused to comply with the stipulation. Subsequently, Mr. Ostwald filed a letter in which he claims that "he spoke too soon" [*see* Dkt. 267] and that he never procured his client's consent. This claim was made against the backdrop of (1) an unambiguous stipulation that Mr. Ostwald himself proposed in court; and (2) Mr. Ostwald's unequivocal representations to both Mr. Tellock and the court that he procured his client's consent.

As noted by Judge Kaye in *Hallock v State*, 64 NY2d 224, 228 (1984), "[a] stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority." This seminal case observed that stipulations are favored by the courts and, particularly when made in open court, are not lightly set aside. *Id.* at 230. This is so because stipulations are essential to efficient court management and the integrity of the litigation process. *Id.* Moreover, even if the attorney lacks actual authority to enter into a stipulation, apparent authority may bind the litigant. *Id.* at 231.

Here, Mr. Ostwald appeared for his client, and more than once represented to the court and other party that he had his client's consent to enter into the stipulation. In keeping with these representations, he produced some of the documents. It was reasonable on these facts for the

other party and the court to rely on his claim of authority to enter into and act upon the stipulation. He and his client cannot now, in contravention of the stipulation, fail to abide by the stipulation by deciding which of the subject documents they wish to produce.

Consequently, the remainder of the documents on the logs must be produced. *See Clement v Millbrook Cent. Sch. Dist.*, 152 AD3d 743 (2d Dept 2017) ("Like any contract, such a stipulation will be enforced so long as it is sufficiently definite in its material terms so as to enable a court 'to determine what in fact the parties have agreed to.'"), quoting *Samonek v Pratt*, 112 AD3d 1044, 1045 (2d Dept 2013) (stipulations "are highly favored, **binding on the parties and strictly enforced**") (emphasis added); *see Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc.*, 71 AD3d 493 (1st Dept 2010) ("the stipulation is an enforceable contract and cannot be revised by the IAS court.). Mr. Ostwald does not contend the stipulation was procured by any circumstance that would permit it to be set aside (e.g., fraud).

Indeed, by selectively disclosing certain attorney client commutations, Mr. Ostwald waived the right to withhold the rest on the ground of privilege. *See Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Trust*, 43 AD3d 56, 64 (1st Dept 2007) ("selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications."), citing *Orco Bank, N.V. v Proteinas Del Pacifico, S.A.*, 179 AD2d 390, 391 (1st Dept 1992). The issue on the privilege motion, as noted, was whether Ms. Arthurs' involvement waived the privilege. As stated above, Mr. Ostwald cannot unilaterally decide which privileged communications should be disclosed and which should be withheld. This is impermissible selective disclosure.

Finally, given the tenor of this litigation, Mr. Tellock and Mr. Ostwald are cautioned that they are toeing the line of what is considered acceptable conduct. Their dislike for one another appears to be rivaled only by the animosity between their clients. Attorneys must rise above the fray, behave professionally, and communicate without ad hominem attacks. Counsel also are cautioned that future conduct the court deems frivolous (i.e., meritless conduct undertaken primarily to delay or prolong the resolution of the litigation) will result in sanctions. Accordingly, it is

ORDERED that, within 2 days of the entry of this order on NYSCEF, Mr. Ostwald shall produce to Mr. Tellock all of the documents on his July 18, 2017 privilege logs that he has yet to produce.

Dated: September 12, 2017

ENTER:

J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C