

Matter of Kurland v Agresti
2019 NY Slip Op 33573(U)
December 4, 2019
Supreme Court, New York County
Docket Number: 152744/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY

PART IAS MOTION 56EFM

Justice

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INDEX NO. 152744/2019

In the Matter of

MOTION DATE 11/26/2019

SAMANTHA KURLAND,

MOTION SEQ. NO. 004

Petitioner,

- v -

PAUL AGRESTI, THE BOARD OF DIRECTORS OF CAST
IRON CORP., and CAST IRON CORP.,

**DECISION + ORDER ON
MOTION**

Respondents.

-----X

In the Matter of

INDEX NO. 155651/2019

SAMANTHA KURLAND,

MOTION DATE 11/26/2019

Petitioner,

MOTION SEQ. NO. 003

-against-

PAUL AGRESTI, THE BOARD OF DIRECTORS OF CAST
IRON CORP., CAST IRON CORP., and SMITH, GAMBRELL
& RUSSELL, LLP

Respondents.

-----X

Proceeding #1 The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 126, 127, 128

were read on this motion to/for JUDGMENT - MONEY

Proceeding #2 The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - MONEY

In these two related proceedings to hold the respondents in contempt of court for violating a restraining notice serviced upon the respondents Board of Directors of Cast Iron

Corp. and Cast Iron Corp. (together the Cast Iron respondents), the petitioner moves to enforce a stipulation of settlement entered into in open court on June 10, 2019, and for an award of attorneys' fees incurred in making these motions. The motion is denied.

On May 23, 2018, the court entered a \$510,377.46 judgment in favor of the petitioner and against the respondent Paul Agresti, upon a jury verdict, in an action entitled Kurland v Agresti, Supreme Court, New York County Index No. 114095/11. The petitioner thereafter served restraining notices upon Agresti and the Cast Iron respondents in accordance with CPLR 5222. The Cast Iron respondents, nonetheless, transferred \$102,250 to Agresti sometime between June and September 2018, thus violating the restraining notice. The petitioner thereafter commenced these two contempt proceedings. By order dated May 3, 2019, this court held the Cast Iron respondents in contempt, and set down the matter for a hearing to determine the appropriate remedy. On the June 10, 2019 hearing date, the parties settled these contempt proceedings, and placed the agreement on the record (see CPLR 2104). The settlement agreement obligated the Cast Iron respondents to obtain an accepted offer of purchase with respect to Agresti's apartment and have a contract in place no later than September 30, 2019. They agreed that the petitioner's judgment, plus statutory interest, was to be satisfied from the proceeds of sale of that apartment, and that she would have the superior interest in the distribution of the proceeds. The Cast Iron respondents further agreed that, if such a contract were not in place by that date, they would be responsible for the payment of the entirety of the principal and interest due and owing on the petitioner's judgment against Agresti, and ultimately would recover their own outlay from the proceeds of sale. The parties also agreed that so much of the proceeds as were allocated to satisfy the petitioner's judgment "would be charged against Mr. Agresti's interest in those proceeds."

When the petitioner learned that the contract of sale had not been fully executed as of September 30, 2019, she first requested the court to sign two orders to show cause permitting her to move to hold the respondents in contempt. On October 7, 2019, the court declined to

sign the orders to show cause. The petitioner thereafter made the instant motions to enforce the stipulation of settlement, and compel the Cast Iron respondents to satisfy Agresti's judgment debt. At oral argument on November 26, 2019, counsel for the Cast Iron respondents conceded that the contract of sale was not executed until October 7, 2019, but that closing was scheduled for December 3, 2019. Under these circumstances, the Cast Iron respondents were in clear breach of their obligations under the settlement agreement and became obligated to pay the petitioner the entirety of the principal and interest due and owing on her judgment against Agresti, minus certain sums already paid to her by the Cast Iron respondents, that is, \$417,439.62, plus interest at 9% per annum from August 6, 2018. Shortly after oral argument on these motions, the parties informed the court that, despite some logistical problems and miscommunications, the Cast Iron respondents tendered the full amount of that obligation to the petitioner's counsel.

Where, as here, a party obtains all of the relief that he or she seeks, the matter has been rendered academic (*see Flessas v Heyman*, 107 AD2d 608 [1st Dept 1985]). Hence, contrary to the petitioner's contention, she is not entitled to the entry of a judgment in these proceedings. Any claim she may have that the closing of sale on Agresti's apartment would have been consummated earlier had the contract been signed on September 30, 2019, rather than October 7, 2019, would be mere speculation, and is not a basis for a further award to her.

"In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed" (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). Contrary to the petitioner's contention, the court expressly declined to "so order" the stipulation of settlement so as to render a breaching party liable for contempt. Rather, in its order dated July 5, 2019, the court carefully ordered only that the petitions and motions were permitted to be withdrawn "upon the stipulation of settlement," not that the terms of the stipulation became judicial mandates. In fact, this was the very reason that

the court declined to sign the proposed orders to show cause that the petitioner initially submitted on October 7, 2019.

The July 5, 2019 order permitting the petitions to be withdrawn upon the stipulation of settlement is not an unequivocal mandate that the parties adhere to the terms of the stipulation. There is no requirement that the court “so order” a stipulation of settlement (*see* CPLR 2104; *Condor Capital Corp. v Delva*, 2016 NY Slip Op 50134[U], 50 Misc 3d 138[A] [App Term, 2d, 11th & 13th Jud Dists, Feb. 5, 2016]). A stipulation of settlement is a contract, subject to the principles of contract construction and interpretation (*see Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990]; *Pierot v Marom*, 172 AD3d 928 [2d Dept 2019]; *VNB N.Y., LLC v Maidi*, 159 AD3d 556, 556 [1st Dept 2018]), and may be enforced as such. Where, as here, no final judgment has been entered in these proceedings, the parties may seek to enforce such a stipulation in the context of the pending proceedings rather than commencing a plenary action (*see Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51 [1979]). In connection with the Cast Iron respondents’ breach of the settlement agreement, the court’s authority was thus limited to enforcing the terms of the agreement. Hence, sanctions for contempt, including an award of attorneys’ fees, are not available here in connection with the breach. Nor does a one-week delay finalizing the contract of sale for the Agresti apartment constitute frivolous litigation conduct on the part of the Cast Iron respondents that would support an award under 22 NYCRR part 130.

Under the long-standing American Rule, attorney’s fees are deemed “incidents of litigation” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]), and a prevailing party cannot recover its legal fees “except where authorized by statute, agreement or court rule” (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]; *see Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203 [1st Dept 2010]). Thus, in the absence of a contractual fee-shifting provision or applicable statute providing for the recovery of attorney’s fees each party to a civil action is generally responsible for its own legal fees (*see Baker v*

Health Mgt. Sys., 98 NY2d 80, 87-88 [2002]; *Hooper Assoc. v AGS Computers*, 74 NY2d at 491]). It is undisputed that the stipulation of settlement did not provide for an award of attorneys' fees where a party required judicial intervention to enforce it. Nor has the petitioner cited to any statute that would authorize the award of such fees here.

Since, however, the petitioner was compelled to initiate these motions, and the motions would have been granted had they not been rendered academic after oral argument, the court awards her \$100 in costs upon each of the motions (see CPLR 8106, 8202).

The court declines at this juncture to address the precise apportionment of the remainder of the proceeds of sale between Agresti and the Cast Iron respondents, except to note that the petitioner will have no liability to either once she provides Agresti with a satisfaction of judgment.

In light of the foregoing, it is

ORDERED that the petitioner's motion in Proceeding No. 1 (SEQ 004) is denied; and it is further,

ORDERED that the petitioner's motion in Proceeding No. 2 (SEQ 003) is denied; and it is further,

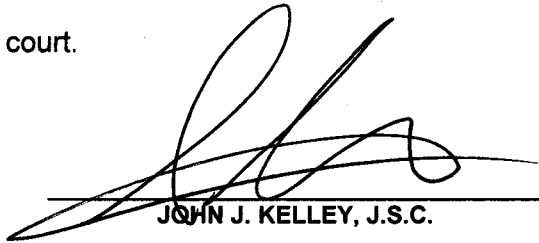
ORDERED that the petitioner is awarded costs upon the motion in Proceeding No. 1 in the sum of \$100.00 (see CPLR 8106, 8202); and it is further,

ORDERED that the petitioner is awarded costs upon the motion in Proceeding No. 2 in the sum of \$100.00 (see CPLR 8106, 8202).

This constitutes the Decision and Order of the court.

12/4/2019

DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: